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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 402

ROBERT O. (BOB) HURT,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

JURISDICTIONAL STATEMENT

ROBERT O. (BOB) HURT,
Appellant,

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INDEX

	PAGE
Jurisdictional Statement	1
Opinions Below	1
Jurisdiction	3
Statute Involved	3
Question Presented	3
Conclusion	11

AUTHORITIES CITED

CASES:

Brown v. Mississippi, 297 U.S. 278, 80 L. Ed. 682, 56 Sup. Ct. 461 — 3, 7-8

Chessman v. Teets, Warden, 77 Sup. Ct. 1127 — 6

Mooney v. Holohan, 294 U.S. 103, 79 L. Ed. 791, 55 Sup. Ct. 240 — 3, 8-9

New York v. Savvides, Court of Appeals of New York, July 11, 1956, 136 N.E.2d 853, 154 N.Y.S.2d 885 (American Bar Journal, December, 1956, Vol. 42, p. 1157) — 9-10

STATUTES:

21 O.S.A., Sec. 801 — 2

28 U.S.C.A., Sec. 1257 — 3

INDEX CONTINUED PAGE

APPENDICES

Appendix "A":

Syllabus of Opinion of Criminal Court of Appeals of the State of Oklahoma, filed September 5, 1956, in Case No. A-12259, Robert O. (Bob) Hurt, Plaintiff in Error v. State of Oklahoma, Defendant in Error i

Appendix "B":

Syllabus of Opinion of Criminal Court of Appeals of the State of Oklahoma, filed May 29, 1957, in Case No. A-12259, Robert O. (Bob) Hurt, Plaintiff in Error v. State of Oklahoma, Defendant in Error xvii

Separate Concurring Opinion of Nix, Judge xlvi

Appendix "C":

Judgment and Sentence li

No. .....

In the
Supreme Court of the United States
OCTOBER TERM, 1956

ROBERT O. (BOB) HURT,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

JURISDICTIONAL STATEMENT

A.

There were two opinions of the Criminal Court of Appeals of the State of Oklahoma, and appellant appends them both, together with a certified copy of the judgment, sought to be reversed. The first, marked "Exhibit A", was delivered September 5, 1956, is reported 303 P.2d 476; the second, marked "Exhibit B," was delivered May 29, 1957 and is reported 312 P.2d 169; and the judgment marked "Exhibit C."

B.

Appellant prosecutes this appeal, insisting that the State of Oklahoma will, unless prevented, under the judgment appealed from, deprive him of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(I) The State of Oklahoma prosecuted appellant in the District Court of Oklahoma County upon a charge of robbery, and the statute pursuant to which the prosecution was brought is as follows:

> "Any person or persons who, with the use of any firearms or any other dangerous weapons, attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night, shall be guilty of a felony, and, upon conviction therefor, shall suffer punishment by death, or imprisonment, at hard labor in the State Penitentiary, for a period of time of not less than five years, at the discretion of the Court, or the jury trying the same." 21 O.S.A., Sec. 801.

(II) The original opinion of the Criminal Court of Appeals was delivered on the 5th day of September, 1956. Two petitions for rehearing were filed and the second overruled November 26, 1956 (Tr. 818). Thereafter appellant filed in the Criminal Court of Appeals his application for leave to file petition for writ of error coram nobis or motion to vacate in the trial court; and for other relief; and this instrument appears at Tr. 822. Leave was granted (Tr. 856) and appellant, having presented his evidence to the trial court in support of his petition for writ of error coram nobis or motion to vacate, and having been there denied relief, brought the matter to the Criminal Court of Appeals (Tr. 1126). The Criminal Court of Appeals thereafter and on May 29, 1957, affirmed the trial court in said denial and wrote a second opinion, which is appended hereto.

Thereafter the Criminal Court of Appeals gave appellant permission to file a petition for rehearing seeking a review of the question considered in both said opinions (Tr. 1280) and this petition for rehearing was denied on June 19, 1957 (Tr. 1300). The notice of appeal was filed in the Criminal Court of Appeals on June 28, 1957 (Tr. 1301).

(III) Appellant believes that Sec. 1257 of Title 28 U.S.C.A. confers jurisdiction on the Court of this appeal.

(IV) Appellant believes that *Mooney* v. *Holohan*, 294 U.S. 103, 79 L. Ed. 791, 55 Sup. Ct. 240; and *Brown* v. *Mississippi*, 297 U.S. 278, 80 L. Ed. 682, 56 Sup. Ct. 461, sustain the jurisdiction of this Court.

C.

The question presented by this appeal is: Will the State of Oklahoma, unless prevented by the Supreme Court of the United States from so doing, under and by virtue of the judgment of the District Court of Oklahoma County, Oklahoma, as here affirmed by the Criminal Court of Appeals of said state, deprive appellant of his liberty for forty-five (45) years without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

OR

Can an accused, by a publicized and televised mistrial, publicly degraded, and the body of society from which juries come advised that the deliberation of a constitutional tribunal trying him for his liberty shall not be sacred and secret but open to invasion, and its members subject to abuse and criticism for the exercise of

honest judgment differing with the press; and, then, in such atmosphere, upon a second trial such accused be deprived of his liberty by entrapment by his attorney (present or former) and by the testimony of his alleged confederates, testifying under promise of leniency which they deny and in which denial they are corroborated by the county attorney and his staff, and this constitute due process of law as that term is used in the Fourteenth Amendment to the Constitution of the United States?

D.

To answer said question intelligently involves a consideration and determination of the following facts: On the 16th day of November, 1954, having theretofore charged this appellant with the crime of robbery with firearms, the State of Oklahoma put him on trial before the Honorable Clarence M. Mills, one of the judges of the District Court of Oklahoma County, Oklahoma, presiding; which said trial differed widely in dignity from the constitutional contemplation in that the same was televised and publicized in violation of the canons of the American Bar Association and the rules of the Federal District Courts (Tr. 1164); in that the judge was attended by armed guards, in the presence of the jury, thereby conveying to said jury the impression that appellant was an outlaw, desperate in character, and dangerous to the safety of the judge (Tr. 1143); in that the public press was permitted to invade the privacy of the jury and to speculate upon and identify a member thereof as holding out for an acquittal during the deliberation of said body (Tr. 1197, Tr. 1206); in that the wife of said juror, badgered and threatened anonymously, was ordered to advise

her husband to return a verdict of guilty or suffer the consequences, which said fact was conveyed to the presiding judge and no action by him taken (Tr. 1170-1171); and in that all the matters hereinbefore set forth were given wide publicity bv the press, appellant degraded before the general public, and all prospective future jurors warned that he who dared oppose a verdict of guilty rendered against the appellant could and would be the object of a vitriolic attack calculated to destroy him.

That then, the jury having failed to agree upon a verdict, a mistrial was declared, and, in this atmosphere, (having denied appellant a change of venue) and on the 14th day of February, 1955, the State of Oklahoma did again place appellant upon trial for his liberty before the Honorable William L. Fogg, another of the District Judges of Oklahoma County, and that in and about said trial the following occurred: Jack Jones, a newspaper reporter, knowing his relation to appellant, secreted upon the person of one Frank Massad, an attorney, theretofore if not then employed to defend appellant upon said charge, a recording device, and procured the said Massad to entrap this appellant into repeating for recording by said device certain matters theretofore discussed between the said Massad and this appellant (Tr. 750); which said recording, together with the testimony of the said Frank Massad, was admitted in evidence against appellant over his objection (Tr. 793); that then the county attorney and his assistants in charge of said prosecution called as witnesses one Adrian Wayne Burns and one Charles Edwin York (both alleged accomplices of appellant) and, having promised each of them leniency in return for his testimony, persuaded the said

witnesses to testify to facts and circumstances calculated to convict this appellant upon said charge and to further falsely testify before the jury that no such promise had been made to them or either of them (Tr. 1264), said officers corroborating instead of correcting said witnesses in said perjury; that upon completion of said trial said County Attorney caused a District Judge of Oklahoma County, Oklahoma (he who presided over the first trial of this appellant) to impose a sentence upon the said Adrian Wayne Burns, the chief offender, so light that the said Burns escaped with less than two years' service in the state penitentiary (Tr. 1247-1248); approached and attempted to persuade the presiding judge of the Criminal Court of Appeals to likewise reduce on appeal the sentence of Charles Edwin York (Tr. 958-959); and, as a reward to the said Massad for his perfidy, the said county attorney did dismiss a perjury charge which had pended against him throughout said trial (Tr. 854-855), and did prevent the disbarment of the said Frank Massad because of unprofessional conduct committed by him (Tr. 1073).

That the matters and facts hereinabove set forth were proven as far as appellant was permitted so to do and where he was denied an opportunity so to do, this amounted to a deprivation of due process of law. *Chessman* v. *Teets, Warden,* 77 Sup. Ct. 1127.

That appellant raised the Federal question—That he was being deprived of his liberty without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States in his second petition for rehearing (Tr. 818); in his application for leave to file petition for writ of error coram nobis or motion to

vacate in the trial court, and for other relief (Tr. 843-844); in his petition for writ of error coram nobis or motion to vacate judgment filed in the District Court of Oklahoma County, Oklahoma (Tr. 872-873); and again, and lastly, in his petition for rehearing so filed by permission of the Criminal Court of Appeals on the 8th day of June, 1957, as the same appears (Tr. 1281).

E.

Appellant contends that, in view of the statement hereinbefore set forth and supported by the record, the Federal question tendered is substantial, and that the nature of the case and rulings of the Court are such as to bring the case within the jurisdictional provisions set forth in the cited statute and cases.

In *Brown* v. *Mississippi*, *supra*, this appears (on page 684 of 80 L. Ed.):

> "The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law, and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitutional right. Id., p. 468.
>
> "The opinion of the state court did not set forth the evidence as to the circumstances in which the confessions were procured. That the evidence established that they were procured by coercion was not questioned."

And again on page 687:

"The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective.

"In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements of due process, and the proceeding thus vitiated could be challenged in any appropriate manner."

Therefore, since it is manifest that a conviction based upon a confession inadmissible and incompetent in evidence will be voided by this Court, it follows consistently that a conviction based upon testimony of an attorney given in violation of appellant's privilege and therefore being inadmissible and incompetent is likewise violative of the Fourteenth Amendment and subject to review by this Court.

In *Mooney* v. *Holohan*, *supra*, 79 L. Ed. 794, 294 U.S. 112-113, this appears:

"'Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of jus-

tice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 317, 71 L. Ed. 270, 273, 47 Sup. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers'."

So it would seem that the conviction of appellant by the use of perjured testimony is such a deprivation of liberty without due process as is cognizable and remediable by this Court.

In *New York* v. *Savvides*, Court of Appeals of New York, July 11, 1956, and in 136 N.E.2d 853 and 154 N.Y.S. 2d 885 (American Bar Journal, December, 1956, Vol. 42, page 1157) the Court said:

"For this reason the Court reversed the defendant's conviction, remarking that even though the other evidence clearly tended to establish guilt, the trial could 'not in any real sense be termed fair'. The prosecuting attorney's failure to show the truth destroyed

one of the fundamentals of a fair trial the Court declared. 'The administration of justice', it said, 'must not only be above reproach, it must also be beyond the suspicion of reproach. The prosecutor should have corrected the trial testimony * * * forthrightly exposed the lie, so that the court and jury would have known that the witness had reason to expect lenient treatment for *continued cooperation.*'"

Judge Nix of the Criminal Court of Appeals, separately concurring, expresses a desire that the opinion in this connection be reviewed by this Honorable Court. In that connection he quoted from the recording as follows:

"Massad: Have you talked to Dave about them subpoenaing me?

Hurt: Oh, he talked to me a half a dozen times about that. But I don't know what angle he's shootin' but he told me you sure couldn't testify.

Massad: Well, ah, I can't see it either, Bob. Now look, I know the law says this: that a privileged communication between attorney and client, when the privilege is invoked, can be made public only by the client, and not by the lawyer."

This done, that member of the Court proceeds to the conclusion that the recording was privileged and inadmissible.

The whole trial of appellant, from its inception to its end, was conducted as a public exhibition or spectacle. Even the privacy of the jury was invaded. Conduct such as this is forbidden by the rules of the Federal District

Judges and the canon of the American Bar Association. Both were adopted to promote and render secure a fair trial to every accused.

WHEREFORE, premises considered, appellant prays: That this Honorable Court take jurisdiction hereof and herein, and grant appellant all such relief as he is entitled to receive, including a reversal of said judgment.

(signed) ROBERT O. (BOB) HURT,
Appellant,

(signed) HERBERT K. HYDE,
Attorney for Appellant,
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(signed) SID WHITE,
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Oklahoma City, Oklahoma.

APPENDIX

"EXHIBIT A"

FILED

In Criminal Court of Appeals of Oklahoma

Sep. 5 - 1956

Andy Payne, Clerk.

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA

ROBERT O. (BOB) HURT, Plaintiff in Error, vs. STATE OF OKLAHOMA, Defendant in Error.	No. A-12,259

SYLLABUS

1. The statute which provides that an attorney shall not be compelled to testify "concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent," is but declaratory of the common law, and should be fairly construed and applied according to the plain import of its terms; the statute is for the benefit of the client, not the attorney. 12 O.S. 1951 § 385.

2. A communication to an attorney, not in his capacity as such, is without the privilege if made before the relation was entered into or after it was ended.

3. Where only a part of a communication between an attorney and client is privileged, if the privileged and unprivileged parts may be safely separated, the privileged matter only will be excluded. But if the separation is involved in difficulty, the whole will be excluded.

4. Where a party objects to the introduction of evidence on the ground that it involves a privileged communication between attorney and client, the burden is upon the one making the objection to show the relationship of attorney and client and other facts to bring the evidence within the terms of the statute pertaining to privileged communications.

5. Where it is contended that certain testimony involved a privileged communication between attorney and client, a question of fact is presented for the determination of the trial court and the finding of such court upon conflicting evidence is controlling on appeal.

6. A wire or tape recording of a conversation between accused and another is admissible in evidence against him when a proper foundation is laid by the proof with respect to the use of this method of reproducing the conversation of the accused.

7. A tape recording which represented conversation between accused and a witness which was traced from time of making original wire recording to reproduction on tape, and until admitted in evidence, and which, witness testified, contained voices of defendant and himself, was properly identified.

8. A tape recording which was made from original wire recording was admissible in evidence over objection that it was not best evidence.

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA
Honorable William L. Fogg, Trial Judge

Robert O. (Bob) Hurt was convicted for the crime of robbery with firearms, and was sentenced to serve a term of 45 years in the penitentiary. AFFIRMED.

David Tant, Oklahoma City
William N. Mounger, Oklahoma City

Attorneys for Plaintiff in Error

Mac Q. Williamson, Attorney General
Sam H. Lattimore, Ass't Atty. General
Granville Scanland, County Attorney
John M. McPherren, Ass't County Attorney
Marian P. Opala, Ass't. County Attorney

Attorneys for Defendant in Error

JONES, Presiding Judge

The defendant, Robert O. (Bob) Hurt, was charged in the District Court of Oklahoma County together with Adrian Wayne Burns and Charles Edwin York with the crime of robbery with firearms; was tried, found guilty by verdict of the jury who left the punishment to be fixed by the court. Thereafter the defendant was sentenced to serve a term of 45 years imprisonment in the penitentiary and has appealed.

A few months preceding the trial of defendant Hurt, York was tried, convicted and sentenced to serve 45 years imprisonment in the penitentiary. On appeal the conviction was affirmed. *York* v. *State*, Okl. Cr., 281 P.2d 769; *In re York*, Okl. Cr. 283 P.2d 567. After the conviction of York, Burns gave a written confession to the county attorney in which he implicated the defendant and York in the commission of the crime. He had not been sentenced at the time he testified for the State against the accused, Hurt, but was later sentenced to serve a term of 7 years imprisonment in the penitentiary. Although York testified in his own trial that he was innocent of the crime, he later changed his story and testified against Hurt giving substantially the same testimony as that given by Burns. After York's appeal had become final and subsequent to the lodging of the appeal by Hurt in the instant case, York again changed his testimony and attempted to repudiate the evidence which he gave at the trial of Hurt.

[APPENDIX]

Two assignments of error are presented: 1. The trial court erred in permitting attorney Frank Massad to testify concerning alleged confidential communications between Massad and the defendant. 2. Trial court committed error in permitting the State to play to the jury an edited tape recording of a conversation alleged to have occurred between Massad and defendant.

The proof of the State showed that Gurley B. Lenn was robbed at his home by two masked bandits in the early morning hours of August 25, 1953, in Oklahoma City. The robbers acted in a cruel and inhuman manner. When Mr. and Mrs. Lenn entered their home about 9:00 P.M. on August 24, they found two masked men on the inside of their house. These two men gagged Mr. and Mrs. Lenn and securely bound them with window sash cord. After that they began abusing the Lenns in an effort to force them to disclose the alleged hiding place of a large amount of money which the robbers claimed was hidden about the premises. For over 7 hours the robbers tortured Mr. Lenn by sticking a red-hot soldering iron or electric hair curler into the rectum of Lenn which caused severe pain and very great physical injury to Lenn. Lenn disclosed to the robbers the hiding place of $5,000.00 in currency and the robbers took that amount of money together with several diamonds, watches and guns and left the premises just before daylight on August 25.

Burns was a constable at Cordell and also operated a gambling game. The Lenns were manufacturers of gambling equipment and had sold to Burns a dice table by which the throw of the dice could be controlled. Burns was also well acquainted with Hurt, having visited in Hurt's home. The record also disclosed that Mr. and Mrs. Hurt and the Lenns had been intimate friends for several years, making frequent visits to each other's homes and on at least two occasions had made extended vacation trips together. The Lenns were possessed of a vicious watchdog named Sunday which would attack strangers.

This dog was left at the home of the Lenns on the evening of August 24 when the Lenns went out to eat their evening meal. When they returned to their home the dog met them at the door and Mrs. Lenn put the dog out the back door into the enclosed backyard before she and Mr. Lenn were confronted by the two masked men.

Burns and York testified in substance that they committed the robbery at the suggestion of Hurt. Burns said that Hurt had asked him repeatedly over a period of several weeks to commit the robbery and told him that he knew that Lenn had several thousand dollars hidden or buried around his place. Burns procured York, whose home was in Tulare, California, but who had visited in Cordell where he worked temporarily for Burns, to assist in the robbery.

According to Burns and York, Hurt accompanied them to the Lenn residence where Hurt opened a window and entered the house so that he could control the vicious dog. Hurt stated that he had become well acquainted with the dog and could control him. After Hurt had entered the house he opened the back door for Burns and York to enter and then Hurt left the premises. After the robbery Burns delivered two one thousand dollar bills to Hurt together with some diamonds and a gun which Hurt had loaned to York for use in the robbery.

Roy Burns, brother of Wayne Burns, and Viola York, mother of Edwin York, corroborated a part of the testimony of Burns and York by relating conversations which they had with the defendant Hurt while the trial of York and Burns was pending.

The most damaging evidence to defendant's cause, however, came from the testimony of Frank Massad, an attorney of Oklahoma City. Over the vigorous objection of counsel for the accused, Massad was permitted to detail cc. versation which he had with Hurt on many occasions. During one of these conversations Massad, un-

known to Hurt, was equipped with a wire recorder which recorded incriminating statements made by Hurt. This recording was edited by the trial court in the absence of the jury and the edited version of the conversation was played to the jury over the objection of Hurt.

Hurt's defense was an alibi. He contended that at the time of the robbery he was playing pool in Jerry's Pool Hall in Oklahoma City with one Art Nugent. Several witnesses corroborated the defendant on his alibi. Defendant specifically denied any connection with the robbery but admitted knowing Burns and testified that he had been hired by attorney Tant to try to find some evidence to sustain an alibi for Burns to be introduced at the trial of Burns.

In connection with the first assignment of error, the record discloses that at the time objection was made to the testimony of Massad, the jury was excused and the court heard many witnesses on the question as to whether Massad was the attorney for Hurt. Massad denied that he was ever the attorney for Hurt but contended the conversations he had with Hurt were because of the relationship between Hurt and Burns and Hurt was attempting to help prepare for the trial of Burns by talking to Massad and Tant who were representing Burns. On the other hand, Hurt testified that the night that Burns was arrested and charged with the crime, Massad came to Hurt's home and informed Hurt that some of the policemen were trying to implicate Hurt in the robbery and that on that occasion Hurt told Massad he wanted him for his attorney and Massad agreed. However, on cross-examination Hurt testified that Massad did not become his attorney until charges were filed against Hurt on May 13, 1954, and that when perjury charges were filed against Massad in Oklahoma County on August 12, 1954, that he no longer considered Massad as his attorney because he felt that on account of the bad publicity which Massad had received, Massad would do him more harm

than good. Hurt testified, however, that he never did discharge Massad as his attorney but that he just let him sort of "ease out." At the conclusion of the hearing in the absence of the jury the trial court made its ruling in which he divided the testimony of Massad into three periods. *The court* held that during the *first period* of time which commenced with the arrest of Burns and ended on May 13, 1954, Massad was not acting as attorney for Hurt and that any conversation which occurred during that period was admissible in evidence against Hurt. The *second period* of time was from May 13, 1954, to August 12, 1954, and the court found that during that period of time, contrary to the testimony of Massad, that the relationship of attorney and client did exist between Massad and Hurt and that any conversation between them during that period was privileged and inadmissible as evidence against Hurt over objection.

The court held that on August 12, 1954, the relationship of attorney and client was dissolved between Massad and Hurt and that any conversation which occurred between them after that date was admissible as evidence.

As to the relationship of Massad and Hurt, Hurt testified:

"Q. Then I take it that it necessarily follows that prior to the day of your arrest, Mr. Massad was not in any manner or sense employed by you as your attorney; is that correct?

A. Correct. That is exactly correct.

* * * * * * * * *

Q. He doesn't represent you in this case that is on trial now?

A. No; he doesn't represent me after you filed that perjury charge against him, I didn't want him in my case.

Q. When was that?

A. I don't know, two or three months ago.

Q. Did you discharge him then?

A. I didn't discharge him, didn't do a thing. I just let him ease around. I didn't want to make the man mad because I knew he was poison.

* * * * * * * * *

Q. He is not your attorney now?

A. No; he is not my attorney right now.

Q. When did he cease to be your attorney?

MR. TANT: I object to that.

A. I never fired him. I just let him out."

The statute involved provides:

"The following persons shall be incompetent to testify: * * * 4. An attorney, concerning any communications made to him by his client, in that relation, or his advice thereon, without the client's consent." 12 O.S. 1951 § 385.

In the early case of *Evans* v. *State*, 5 Okl. Cr. 643, 115 Pac. 810, this court held:

"The statute which provides that an attorney shall not be compelled to testify 'concerning any communication made to him by his client, in that relation or his advice thereon without the client's consent', is but declaratory of the common law, and should be fairly construed and applied according to the plain import of its terms; the statute is for the benefit of the client, not the attorney.

"An attorney is employed in his professional capacity when he is voluntarily listening to a client's preliminary statement. It is not necessary that any retainer should have been promised, paid, charged;

or demanded, and it makes no difference even though the services are gratuitous."

In the body of the opinion the court quoted from Professor Wigmore with approval as follows:

> "It follows that a communication to an attorney, not in his capacity as such, is without the privilege if made before the relation was entered into or after it was ended."

In 58 Am. Jur., Witnesses, § 483, it is stated:

> "Where only a part of a communication between an attorney and client is privileged, if the privileged and unprivileged parts may be safely separated it seems that the privileged matter only will be excluded. But if the separation is involved in difficulty, the whole will be excluded."

Where a party objects to the introduction of evidence on the ground that it involves a privileged communication between attorney and client, the burden is upon the one making the objection to show the relationship of attorney and client and other facts to bring the evidence within the terms of the statute pertaining to privileged communications. 58 Am. Jur., Witnesses, § 520; *McGrede* v. *Rembert National Bank* (Tex.), 147 S.W. 2d 580, *Phelps-Dodge Corp.* v. *Guerrero*, 273 Fed. 415; *Childs* v. *Merrill*, (Vt.), 29 Atl. 532. It presents a question of fact for the determination of the trial court and the finding of such court upon conflicting evidence is controlling on appeal. 58 Am. Jur., Witnesses, § 482; *Rowland* v. *State*, 75 Okl. Cr. 164, 129 P.2d 609. In *Henson* v. *State*, 97 Okl. Cr. 240, 261 P.2d 916, this court held:

> "An attorney would not be an incompetent witness against accused unless the relationship of attorney and client existed between the attorney and the accused and such relationship must be so regarded by the accused."

To the same effect is *Potts* v. *Hale-Halsell Co.*, 150 Okl. 248, 1 P.2d 650. We think the law amply sustains the trial court in dividing the relationship between Massad and the defendant Hurt into three periods, the first being from the date of the arrest of Burns in September, 1953, down to the date charges were filed against Hurt on May 13, 1954. During that period Massad was acting as attorney for the codefendant, Burns, and according to the testimony of Massad which is bolstered in large part by the testimony of the defendant, no attorney-client relationship between Hurt and Massad existed, but Hurt was doing his utmost to assist in procuring alibi witnesses to be used in the defense of Burns. The second period from May 13, 1954, to August 12, 1954, was the interval fixed by the court as the period during which Massad acted as attorney for Hurt and no testimony as to any communications made during that period was admitted in evidence. On August 12, 1954, perjury charges were filed against Massad. Hurt testified that he did not want him as his attorney after that for the reason that he thought Massad would hurt him more than he would help him and he just let him ease out of the case. The wire recording which contained the conversation between Massad and Hurt was taken on October 20, 1954. Part of this conversation occurred in an automobile and part of it at Marsh's Drive-In Restaurant in Oklahoma City. Unknown to Hurt, Massad had concealed a wire recorder on his body and the entire conversation was taken on the wire recorder transcribed and reproduced on a tape recorder. The conversation on the tape recorder was played in its entirety by the trial judge in the absence of the jury and some wholly irrelevant and profane matters were deleted and the remainder was played to the jury. The defendant Hurt in his testimony admitted that the recording as played to the jury contained substantially the statements which he and Massad made to each other at the time and place in question. This conversation between Massad and Hurt occurred more than two months after Hurt said that

he had let Massad ease out of his case as an attorney and occurred subsequent to a time when Hurt's attorney, Mr. Tant, had conferred with Hurt concerning the possibility of Massad being used as a witness against him.

We think that it would be improper and unfair to exclude testimony involving a communication between attorney and client while such relationship was in existence and then after the relationship had terminated to permit the attorney through artifice to have the client repeat much of the privileged conversation for the purpose of enabling the attorney to testify in court regarding such privileged communication. See *Yordan* v. *Hess*, (N.Y.), 13 Johns 492, where the court said:

> "The confessions by plaintiff to Brackett were made after he ceased to be his attorney; and although they were, substantially, a reiteration of what had been communicated whilst the relation of attorney and client existed, yet they appear to have been voluntary disclosures, in no way sought for or drawn out by the witness. An attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated to him in that capacity. But this is the privilege of the client, and if he chooses, after this relation has ceased, to volunteer any communications, he is not protected, although they may be, in substance, the same as were given while that relation subsisted. The reason for the rule then ceases. If a repetition of the information should appear to have been drawn out by any artifice, for the purpose of being used as evidence, it ought not to be received. But when it is perfectly voluntary and unsought for, there can be no solid ground for excluding the evidence."

Here, however, there was no contention by the accused at the time the tape recording was introduced in evidence that it constituted a reiteration of communication between

Massad and Hurt while the privileged relationship of attorney and client was in existence.

Since the trial court separated the privileged communications from the unprivileged communications after a hearing on the question in the absence of the jury, we are of the opinion that we should uphold the ruling of the trial court unless the record shows that the communications were so intertwined that they could not be separated. In that connection, since the principal testimony of Massad was in connection with the introduction of a wire recording of a conversation which occurred between Massad and Hurt on October 20, 1954, it is pertinent to refer to such recorded statement to ascertain the attitude of Hurt toward Massad. In considering this recorded statement it should be borne in mind that it was given approximately two months after Hurt said that he no longer considered Massad as his attorney because perjury charges had been filed against Massad in connection with another criminal action. In the recorded conversation it is shown that Hurt accused Massad of planning to testify against him and at one point Hurt asked Massad whether he had a recording device on him. It is apparent that Hurt made the incriminating statements contained in the wire recording to Massad at a time when he no longer considered Massad as his attorney and he made those statements after his attention had been called by attorney Tant to the fact that Massad probably would be called to testify against Hurt. Under such a state of the record we feel that the conversation which Hurt had with Massad on that occasion was not privileged. It was no more privileged at that time than a conversation which Hurt might have had with a total stranger because he was making disclosures to Massad knowing that Massad might be called as a witness against him and knowing that Massad was no longer his attorney and would not represent him at the trial.

This brings us to the second contention of the accused, that the court erred in permitting the State to play to the jury the edited tape recording of the conversation between Massad and the defendant. When the State first attempted to introduce the tape recording in evidence, it was shown that the conversation between Massad and Hurt was first recorded on what is known as a wire recorder; that later a copy of the wire recording was made on a tape recorder so that the sound would be more audible, and that the wire recording had been lost or destroyed. The tape recording was played to the court in the absence of the jury. It contained a large amount of wholly irrelevant matter not pertaining to the case and also many vulgar and profane statements which the court ordered deleted before permitting the tape recording to be played to the jury. The deletions on the tape recording were supervised by the court. At the time this edited tape recording was introduced in evidence, counsel for the accused objected to the introduction of such recording for the reason that the tape recording was merely a purported copy of the original wire recording and not the best evidence.

When the defendant Hurt was testifying, he admitted that the tape recording reflected solely his voice and that of Massad and that it was a true reproduction of the conversation had between him and Massad on October 20, 1954. In the case of *Williams* v. *State*, 93 Okl. Cr. 260, 226 P.2d 989, this court thoroughly discussed the admissibility of wire recordings. This court discussed the advantage to be gained by courts utilizing modern methods of science in ascertaining facts. We quoted from the case of *Commonwealth* v. *Clark*, (Pa.), 187 Atl. 237, wherein it was stated:

> "The phonograph, the dictaphone, the talking motion picture machine, and similar recording devices, with reproducing apparatus, are now in such common use that the verity of their recording and reproducing

sounds, including those made by the human voice in conversation, is well established; and as advances in such matters of scientific research and discovery are made and generally adopted, the courts will be permitted to make use of them by way of presenting evidentiary facts to the jury."

In the body of the opinion we stated:

"It is our conclusion after fully considering this question that the rules determining the admissibility of a confession taken on a phonographic record or on a wire such as in the instant case or a disc are to be determined by the same rules as govern the taking of a confession by shorthand, which is later transcribed. That is, the party offering the wire recording in evidence must make a showing with reference to its preparation, that is, whether the mechanical device was sufficiently capable of taking the confession; and also there should be a proper showing as to the manner of the preservation of the wire recording, that is, as to whether any changes have been made, deletions, or additions to the recording, and of the correctness. The genuineness or the authenticity of the recording must be established. The contention of counsel that the recording should have been rejected because the evidence disclosed that the wire may be erased or otherwise changed likewise applies to a confession which is taken by a court reporter in shorthand and later transcribed. The rules as to the authenticity or genuineness of the confession are the same. If the party objecting to the confession can make a showing that it has been erased or deleted or changed in any manner the court would sustain an objection to its admissibility. The wire recorder which reproduces the actual voice of the accused and those who may be questioning him should be of much more value to the court and the jury than a confession taken in shorthand and later reduced to writing, especially

where an issue has been raised as to whether the confession was voluntarily made."

In the recent case of *Thompson* v. *State*, Okl. Cr., 298 P.2d 464, it was held:

"A tape recording secretly made, without the knowledge or consent of defendant, of conversation between defendant and another prisoner in adjoining cells, properly identified, is admissible in evidence."

The Attorney General has cited the case of *State of Washington* v. *Lyskoski*, 287 P.2d 114, as being squarely in point with the question here raised. In that case it is stated:

"After Edwards started collaborating with the prosecuting attorney's office in the instant case, Marvin Stenholm, chief investigator for the office, rented a miniature battery-powered 'Minifon' wire recorder from Electricraft, Inc., and showed Edwards how to operate it with the recorder concealed in his belt and the minature microphone in his shirt pocket.

"Being thus equipped, Edwards telephoned appellant at about three p.m. on April 20, 1954, in an effort to elicit some admissions from him. This conversation was recorded, but, when it was played back in Stenholm's office, it proved to be partially unintelligible. Edwards made a second call which proved to be more intelligible. Edwards then arranged for a meeting that evening. They sat in appellant's car outside the China Pheasant cafe, where a conversation of approximately an hour between Edwards and appellant was recorded. These original wire records are inaudible without the aid of earphones.

"Later, Chief Stenholm took the wire recording to Electricraft, Inc., and a Mr. Runchey 'dubbed' the conversations from the original wire recording, by a standard reproduction process, to a tape recording,

which can be played audibly without recourse to earphones. Stenholm and Edwards testified that they listened with earphones to the original recordings and Stenholm was present when Runchey made the audible tape recording.

"The original wire recording is the state's exhibit No. 59, and the audible tape recording 'dubbed' from the original is the state's exhibit No. 60.

* * * * * * * * *

"Appellant contends that the exhibits were not properly identified. We do not agree. They were traced from the time of making the original recording until they were admitted in evidence, and Edwards testified, after the recording had been played for the jury, that the voices were those of appellant and himself.

"Appellant contends that the audible tape recording is secondary evidence and is not admissible because the best evidence is available.

"The audible tape recording bears the same relationship to the inaudible wire recording that a photograph bears to a negative. No good purpose would be served by not following the rule applicable to them. See 3 Wigmore on Evidence (3d ed.) 196, § 796. We hold the tape recording was admissible."

It is our conclusion that the court acted properly in editing the tape recording and eliminating the irrelevant matter; that the State made a sufficient showing of the authenticity of the recording to permit its introduction as evidence and that the authenticity of such recording was further established by the admission of the accused in his testimony that it was a reproduction of the conversation had between him and Massad.

AFFIRMED.

BRETT and POWELL, J.J., concur.

"EXHIBIT B."

FILED

In Criminal Court of Appeals of Oklahoma

May 29, 1957

ANDY PAYNE, Clerk

IN THE CRIMINAL COURT OF APPEALS OF THE STATE OF OKLAHOMA.

ROBERT O. (BOB) HURT,
Plaintiff in Error,
vs.
THE STATE OF OKLAHOMA,
Defendant in Error.

No. A-12,259

SYLLABUS

1. Where a writ of error coram nobis is sought, the petition should be filed in the court where judgment complained of was rendered, but if the case is pending in the Criminal Court of Appeals on appeal, or if appeal has been affirmed, permission should be obtained from the Criminal Court of Appeals prior to filing in trial court.

2. It is necessary for the proposed petition to state a prima facie case before permission to file in trial court will be granted.

3. The constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured. 14th Amend. U.S. Const.; Art II, § 7 Okla. Const.

4. Where a co-defendant in a case confesses and agrees to testify for the State, if such was induced by a promise of lenient treatment by the

prosecution, and thereafter said co-defendant does testify but denies that he has been promised leniency by the State, and the county attorney stands silent, knowing such statement to be false, and does not correct the statement, such would constitute error so fundamental and substantial that a verdict of guilt would not be permitted to stand.

5. Where petition for writ of error coram nobis is filed in the trial court where conviction had, the judge may properly invite two judges of other divisions of his district to sit with him in an advisory capacity.

6. When, after appeal to the Criminal Court of Appeals from conviction, petitioner-defendant is granted permission to apply to the trial court for a writ of error coram nobis, and the trial court hears evidence and denies the writ and appeal is perfected to this court for review, and the case is submitted for opinion, ordinarily the filing of further motions to refer the case back for the hearing of further evidence will be denied as coming too late, as there never would be an end to proceedings if defendant could keep on filing applications ad infinitum to go back and forth for further hearings.

7. The functions of a writ of error coram nobis are limited to an error of fact for which the statute provides no other remedy, which fact did not appear of record or was unknown to the court when judgment was pronounced, and which, if known, would have prevented the judgment, and which was unknown and could not have been known to the party by the exercise of reasonable diligence in time to have been otherwise presented to the court, unless he was prevented

from so presenting them by duress, fear, or other sufficient cause. The writ does not lie to correct errors of law.

8. The burden is cast on petitioner in application for writ of error coram nobis to establish the material allegations of his petition by a preponderance of the evidence.

9. On appeal from the judgment of a trial court refusing to grant a writ of error coram nobis, the Criminal Court of Appeals will not weigh conflicting evidence, but will affirm the order or judgment if there is any competent evidence in the record, together with the reasonable inferences and deductions to be drawn therefrom, supporting the court's findings.

10. Record examined and while the evidence found to be conflicting, there is found to be substantial evidence to support the judgment of the court.

PROCEEDING seeking review of the action of the District Court of Oklahoma County, Oklahoma (William L. Fogg, Judge, and Glenn O. Morris and W. R. Wallace, Jr., sitting in an advisory capacity), refusing to grant a writ of error coram nobis. Judgment of District Court AFFIRMED.

Sid White, Oklahoma City, Oklahoma,
Attorney for Plaintiff in Error.

Mac Q. Williamson, Attorney General,
James W. Bill Berry, County Attorney and
Harold C. Theus, Assistant County Attorney
Oklahoma County, Oklahoma,
Attorneys for Defendant in Error.

POWELL, JUDGE:

This case is here for the purpose of reviewing the action of the district court of Oklahoma County, which after hearing, refused to grant a writ of error coram

nobis[1], which is to say, to grant the petitioner a new trial for alleged errors of fact, said to have been unknown at the time of trial of *State* v. *Hurt* in the district court of Oklahoma County on February 11, 1955, and which, if known, would have brought about a different result. A number of grounds were set out in the petition, which was filed on February 6, 1957 in this court, attached to an application for leave to file in the district court of Oklahoma County, the court that in its case No. 22662 rendered the judgment in question. This constituted proper procedure. *Hendricks* v. *State*, Okl. Cr., 297 P2d 576.[2] Permission was granted, as the petition alleged a course of fraudulent conduct on the part of the prosecuting officials and certain witnesses alleged to have been only discovered at the time of application, which was sufficient on the face to make out a prima facie case.

A long list of authorities supports the statement found in 24 CJS § 1606, p. 149, that:

> "The writ does not ordinarily lie for alleged false testimony at the trial",

but the Supreme Court of the United States said in *Mooney* v. *Holohan, Warden*, 294 US 103, 115; 55 SCt 340, 98 ALR 406, 79 L.Ed 791:

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1. "Although the two terms [coram nobis and coram vobis] have been used interchangeably by good authority, the writ of error coram nobis differs from a writ of error coram vobis in that the writ coram nobis is issued from a court to correct certain errors of fact made in the court that issues the writ, while the writ coram vobis is issued to correct certain errors of fact made in an inferior tribunal." 24 CJS § 1606 p. 144. The term for our purpose is *coram nobis*.

2. As an apparent precautionary measure by reason of there being no statutory procedure, the petitioner not only filed application for writ in case No 22,662, in the trial court, but also filed the same petition in two separate cases, No. 24,257 (criminal) and No. 140,568 (civil), which cases were consolidated by the trial court for purpose of hearing. From what we said in the Hendricks case, it should have been apparent that the filing of the application under a new number was wholly unnecessary, the object of the writ being to obtain relief in the original case in the court where the case was tried, and if possible before the actual trial judge.

"The constitutional requirement of due process is not satisfied where a conviction is obtained by the presentation of testimony known to the prosecuting authorities to be perjured."

See 14th Amendment to the Constitution of the United States, and Art. II, § 7, Const. Okla.

Petitioner-defendant urges the case of *People* v. *Savvides*, 154 N.Y.S.2d 885 (July, 1956), as being in point and as supporting his right to the writ sought. We have not only examined that case, but the earlier cases of *People* v. *Creasy*, 236 N.Y. 205, 221, 140 NE 563; and *People* v. *Mleczko*, 298 N.Y. 153, 81 NE2d 65, 59. Also bearing on the development of the use of the writ of error coram nobis in New York State, *New York ex rel Whiteman* v. *Wilson*, 318 US 688-692, 63 SCt 840, 87 LEd 1083; and Coram Nobis, by Eli Frank.[3]

We are in general in agreement with the New York cases, and in particular with the holding in the *Savvides* case.

But is Savvides in point in the facts of the case before us? That will be the point for determination.

In the *Savvides* case one Mantzinos was "apprehended while picking up a quantity of marijuana from a locker in a New York City bus terminal." He implicated Savva Savvides, as the one from whom he had obtained the narcotic drug. Thereafter Mantzinos pleaded guilty to felonious possession with intent to sell, which carried with it a mandatory minimum sentence, and thereupon "the assistant district attorney advised the court that the plea was taken with the 'understanding' that, upon Martzinos' 'continued truthful co-operation', the district attorney would 'permit' him to withdraw it and plead guilty to a lesser crime, one carrying no mandatory minimum."

3. Published by Newkirk Associates Inc., Albany, N.Y

Savvides was tried before a different judge and witness Mantzinos denied that the prosecuting attorney had promised him anything, and the same attorney who had advised the judge accepting what amounted to a conditional plea of guilty, stood by and did not correct the lie.

We quote from the body of the opinion:

"Some days after the jury found Savvides guilty, the agreement with Mantzinos was carried out. The court, assured by the district attorney that Mantzinos' co-operation was 'the ultimate factor' in obtaining that conviction, suspended execution of the one to two year sentence of imprisonment which it had imposed, after allowing him to withdraw his original plea and plead guilty to an attempt."

Savvides, learning of these matters, sought a writ of error coram nobis, which was denied by the trial court, and on appeal by the Appellate Division, but was allowed by the Court of Appeals of New York. The court held:

"* * * where witness for the prosecution falsely testified that there was no agreement that he was to receive lenient treatment for testifying against defendant, Assistant District Attorney should have exposed the lie of the witness, and failure to do so constituted error so fundamental and substantial that verdict of guilty would not be permitted to stand, even though proof of the defendant's guilt may have been convincing."

And in the body of the opinion the court said:

"Where a promise of leniency or other consideration is held out to a self-confessed criminal accomplice for his co-operation, there is grave danger that, if he be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest. Long experience in granting leniency to 'co-operative' accomplices has undoubtedly shown the hazards in the practice to be more than offset by benefits to

society in the detection and punishment of crime. It requires no extended discussion, however, to establish that the existence of such a promise might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony. The failure to disclose an 'understanding' or a promise cannot but seriously impair the jury's ability to pass upon this vital issue, and that is precisely the infirmity under which the jurors labored in the case before us."

It was pointed out that while the trial judge by interrogation elicited some vague answers which might have induced the jury to believe that Mantzinos was "hoping" for leniency, and his charge to the jury indicated the judge's own belief that the witness entertained such hope, the appellate court said:

> "But that is a far cry from positive knowledge that Mantzinos had actually been assured consideration in return for continued co-operation and that he had deliberately lied about the matter on the stand."

In the within case petitioner-defendant had been charged with Adrian Wayne Burns and Charles Edwin York with the crime of robbery with fire-arms, and in a case where a curling iron was inserted in the victim's rectum and plugged into an electric socket, and causing him serious injury, but resulting in his disclosing the hiding place of $5,000 in money and $2800 worth of diamonds.

Petitioner, hereinafter referred to as defendant, was tried, found guilty by the verdict of a jury, but the penalty was left to be fixed by the court, who on March 16, 1955 fixed the punishment by sentence of 45 years imprisonment in the State Penitentiary. Defendant appealed to this court, and in case No. A-12,259, *Hurt* v. *State*, Okl.Cr., P2d , the Criminal Court of Appeals on September 8, 1956 affirmed the judgment. On October 20, 1956 petition for rehearing was filed by new counsel, and was

heard and denied, after various continuances on account of the death, in August, 1956 of David Tant, the attorney handling the appeal. New counsel (O. A. Cargill and Duke Duvall) at time of oral argument, frankly admitted that the evidence and facts disclosed by the record fully sustained the conviction of the defendant Hurt, and that they had no brief in that regard, but they did earnestly present a legal question as to the admissibility of the testimony of attorney Massad, who testified for the State. That matter had been fully treated by this court in the opinion theretofore promulgated, so that the petition for rehearing was denied.

A second petition for rehearing was filed November 26, 1956 by newer counsel, Sid White, Esq., was heard and overruled, and on January 10, 1957 defendant was granted until March 11, 1957 in which to perfect an appeal to the Supreme Court of the United States, and then by reason of the coram nobis procedure, this time was subsequently extended, and the issuance of mandate stayed.

As a background for the consideration of the denial by the trial court of the granting of a writ of error coram nobis, we shall take judicial knowledge of the disposition of the separate cases against petitioner-defendant's alleged accomplices, York and Burns, as disclosed by designated proceedings before this court.

To commence with, Charles Edwin York and Adrian Wayne Burns under date of December 7, 1953 were indicted by a grand jury of Oklahoma County for conjoint robbery with firearms; a severance was granted and York was tried before a jury on March 20, 1954, found guilty and the jury fixed his punishment at 45 years confinement in the penitentiary. Judgment and sentence was dated March 30, 1954. Notice of appeal to the Criminal Court of Appeals was given, and petition in error and transcript was filed in this court on May 10, 1954 and additional time was granted for the purpose of supplementing the record by a transcript of the evidence taken at the trial. It was

sought to have the record prepared at the expense of the county, but David Tant, a lawyer of Oklahoma County, having admitted in open court that the Burns family had paid him several thousand dollars to defend Burns and his co-defendant York, this court refused to order a record at the expense of Oklahoma County, and no further record was ever filed, although counsel was advised that the evidence in narrative form would be acceptable, where agreed upon by counsel for the State, and settled by the trial judge, or in case of dispute, as finally settled by the trial judge. In absence of record this court was compelled to and did affirm the case. See *York* v. *State*, Okl.Cr., 281 P2d 769 (March, 1955).

An information was filed in the district court of Oklahoma County against Robert O. (Bob) Hurt on July 15, 1954 wherein he was charged with the crime of robbery with firearms "acting conjointly and together with Charles Edwin York and Wayne Adrian Burns.": The first trial of Hurt commenced November 16, 1954. York testified for the State and admitted that he had testified falsely in his own behalf in his trial. York's appeal was then pending in the Criminal Court of Appeals, but he was apparently of the opinion that his attorney, who was also representing Hurt, had abandoned him. York confessed his part in the robbery with which he was charged, and implicated his alleged accomplices, Burns and Hurt. The jury could not agree, and a mistrial was declared.

Thereafter, Hurt's second trial commenced February 14, 1955 and he was convicted, the court fixing the same penalty that a jury had assessed against York.

Thereafter, on April 27, 1955 this court denied the application of York for release by way of writ of habeas corpus, or in lieu thereof the modification of sentence. (*Ex parte York*, 283 P2d 567) The Criminal Court of Appeals has repeatedly held that it has no jurisdiction to modify a sentence on petition for writ of habeas corpus. Only on

appeal, where a record of the evidence taken at the trial would be before this court could it justify or have jurisdiction to modify a sentence. *Perry* v. *Waters* (Warden), 97 Okl.Cr. 17, 256 P2d 1119; *Ex parte Berryhill*, 87 Okl.Cr. 48, 194 P2d 214; *Ex parte Moore*, 88 Okl.Cr. 105, 200 P2d 454; *Hanks* v. *Waters* (Warden), 95 Okl.Cr. 84, 240 P2d 115.

Thereafter, on April 28, 1955, Wayne Adrian Burns in cases Nos. 22,283 and 22,284 in the district court of Oklahoma County, entered his pleas of guilty and on recommendation of the county attorney was assessed a sentence of seven years confinement in the State penitentiary in each case, sentences to run concurrently.

The writer in the above mentioned York habeas corpus case, (*Ex parte York*, Okla. Cr., 283 P2d 567, 572), wrote a concurring opinion. It seemed that the excuse that an appeal would have been futile by reason of the confession of York and hence a failure to perfect the record on appeal was useless, was a lame excuse in view of the fact that a large fee had been paid attorney Tant by the Burns family to defend not only Burns, but York, and a record disclosing matters set out in the petition for a writ of habeas corpus might have persuaded this court to modify the sentence imposed. At least, consideration might have been given to that subject. It was the opinion of this writer that a conflict in interest had developed between York and Burns on the one hand, and Hurt on the other, and counsel should have openly chosen between clients. Undoubtedly his loyalty to Hurt could not be questioned.

Such was the status of the cases of York, Burns and Hurt, when the appeal of Hurt was perfected to this court by the filing of casemade and petition in error herein on September 13, 1955.

We proceed now to a consideration of the petition for writ of error, coram nobis, and to the proceedings in the trial court.

The evidence discloses that the hearing for the writ took place before Judge William L. Fogg, the judge before whom the case complained of was tried, and that by agreement of the parties, Judge Glen O. Morris and Judge W. R. Wallace, Jr., sat in an advisory capacity, though counsel for defendant insisted that they sit en banc. We approve the procedure followed.

The hearing commenced on February 27, and was completed on February 28, 1957 and the writ was denied. Counsel in open court gave notice of appeal to the Criminal Court of Appeals, and then filed a motion for rehearing, entitled "Motion for new trial", which was on March 4, 1957 denied, and counsel again gave notice in open court of his intention to appeal to this court, and was granted an extension of time to make and serve casemade to and including March 25, 1957, respondent to have three days thereafter to suggest amendments, casemade to be settled upon three days notice by either party. It was signed and settled March 19, 1957, filed in the office of the clerk of the trial court, withdrawn and filed in this court on March 19, 1957. We approve the procedure, and find that due diligence was used in having the record prepared and filed here necessary to give this court jurisdiction to review the action of the trial court in denying the writ of error coram nobis.

Counsel under date of March 27, 1957 filed in this court what was denominated "Application to Diminute Record and For Other Purposes", in which he sought to raise certain legal issues with reference to the Seventh Judicial District, of which Oklahoma County is a part, and by which it was claimed that defendant was entitled to have had his petition for writ of error coram nobis heard before a judge other than the actual trial judge, William L. Fogg, and wherein allegations were made for the purpose of showing the disqualification of Judge Fogg.

Brief in the case was filed in this court April 10, 1957, and after the case had been under consideration there was

filed under date of April 26, 1957, a further application to further "diminute" the record, all of which would require a referral back to the trial court for hearing further evidence.

Judge Fogg filed an affidavit, denying in toto the allegations of the petition, and thereupon defendant filed a third application to diminute the record. We ordered the county attorney of Oklahoma County to respond, and thereupon the defendant filed a fourth instrument, denominated "Ancillary Application In Nature of Coram Nobis to Diminute the Record", containing allegations concerning body guard for the trial judge during trial, and attempting to raise matters that were presumably within the knowledge of the defendant at trial and prior to disposal of appeal. The various motions were by this court denied and overruled on May 15, 1957. As said by this court in *Ex rel Mitchell* v. *Swindall, et al*, 33 Okl. Cr. 210, 241 P. 456:

> "The writ of error coram nobis is a common-law remedy, afforded on application to the trial court for the correction of errors of fact unknown at the time of the trial to the party seeking relief and to the court."

See also: *State ex rel Attorney General* v. *Hurst*, 59 Okl.Cr. 220, 57 P2d 666; *Hendricks* v. *State*, Okl. Cr. 297 P2d 576.

Further, we consider it within the discretion of a trial court whether or not he will require an officer to remain in the court room to maintain order and preserve the peace during the proceedings. Such could be for the protection of a defendant or litigant as well as the court. However, we take judicial knowledge that two of the witnesses in the trial of Hurt (Burns and York), were then prisoners in the State Penitentiary at McAlester, and of necessity had to be conducted to and from the court room by officers, who would have to be near such witnesses at all times.

There never would be an end to the proceedings if defendant could keep on filing applications ad infinitum and go back and forth for further hearings. Judge Fogg prior to the hearing on February 27 and 28, 1957, gave counsel opportunity to disqualify him as provided by statute (22 O.S. 1951 §571), and Mr. White, counsel for defendant, said: "I can't do it under the statute. I'm not in possession of facts enough to do it."[4]

In one of the motions to diminute the record it is alleged that defendant has never violated any laws. It is said that, "your defendant is a man of small education, without learning in the law or legal terms, and without information or knowledge as to his constitutional rights." These are most amazing statements in view of the fact that at one place it is admitted that defendant was once convicted of a misdemeanor, and the trial record discloses that defendant received commissions from Gurley B. Lenn, who manufactured crooked gambling paraphanalia, for the sale of such equipment. And by his own admission as well as other evidence, it was shown that he for a time operated gaming tables for one of the American Legion Posts in Oklahoma City. In fact, defendant was an officer with the Oklahoma City police department for over eight years, and had been a constable of Oklahoma County about two years at the time he was charged with armed robbery. And it is prerequisite to qualify as an officer that he become familiar with the constitutional rights of citizens, and

4. In *Humphreys* v. *State* (Wash.) 224 P. 937, 33 ALR 78, where coram nobis was sought to secure a new trial for newly discovered evidence, the court laid down a principle that seems applicable to these applications to diminute the record. It was said: "It seems highly probable that in all cases of newly discovered evidence touching exclusively the merits of the issue actually tried and determined there can be no relief under any circumstances at the hands of the courts. To open the door to such inquiry would be to create a condition wherein the judgment of courts would have no finality, and thus be fruitful of greater evil than would flow from very rare cases of possible injustice, which would, however, not be beyond all cure, for, if injustice results from any such condition, it is readily curable, as far as human ingenuity can safely do, upon proper showing by a resort to the pardoning power."

with ten years experience as an officer, defendant was bound to have had a practical knowledge of trial court procedure, and most assuredly knew that it was unlawful for any citizen, and particularly an officer, to operate gaming tables or sell crooked gambling equipment. From a consideration of the various instruments before us in these proceedings, we find the attacks made on Judge Fogg vicious and without any foundation, and without regard to Rule 10 of this court.[5]

The Criminal Court of Appeals has never before granted a petitioner (where case pending in this court on appeal) permission to appeal to the trial court for a writ of error coram nobis. And from the historical background we find that the writ was devised, not by legislation, but by the judiciary, as a suitable method to meet some of the extreme exigencies of justice. The procedure must of necessity, in our State, be by rule of court. Technicalities should not be favored. In *Hendricks* v. *State, supra,* we referred to our prior decisions and attempted to point the way, but cautioned that the writ would reach only matters not cognizable on motion for new trial, in arrest of judgment, or on appeal. And we said: "We can conceive of few situations where specific statutory provisions in this State would not afford relief."[6]

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5. Rule 10: "No argument or motion filed or made in this Court shall contain language showing disrespect for or contempt of the trial court."

6. We have not heretofore approved rules or procedure. But in giving the various questions consideration, we feel that we know what the dissenting judge meant when in *Anderson* v. *Buchanan,* 292 Ky. 810, 168 SW2d 48, 55, he said: "Our decisions are in such confusion on the writ of coram nobis that no one can tell where we stand. In writing on the subject we have wobbled and bobbled like a lost raft at sea. But we are not alone, as other courts likewise seem to be without mast and compass when sailing this sea. Reference to the texts and reported decisions of foreign jurisdictions will show that other courts are in the same state of confusion. The writ of coram nobis appears to be the wild ass of the law which the courts cannot control. It was hoary with age and even obsolete in England before the time of Blackstone, and courts who attempt to deal with it become lost in the midst and fog of the ancient common law.'"

In considering the petition for writ of error coram nobis filed and heard in the trial court and the action of said court with reference thereto, we have recognized the generally accepted principle that the writ of error coram nobis or coram vobis lies only to correct errors of fact and may not be resorted to for purpose of correcting errors of law. 24 CJS §1606(5); Coram Nobis, Common Law-Federal-Statutory, With Forms, by Eli Frank, Newkirk Associates Inc., Albany N.Y.; *People* v. *Kretchmar* (Calif.) 72 P2d 243; 3 Am.Jur. 766; *Mandell* v. *People* (Colo.) 231 P. 199; *State* v. *Pyle*, 173 Kan. 425, 248 P2d 1086.

And by reason of this rule we have eliminated from consideration several legal questions attempted to be raised, and shall consider only the propositions advanced that in the first instance persuaded this court that a *prima facie* case had been stated, and justified us in referral to the trial court to resolve and grant or refuse to grant the defendant a new trial, depending on his producing or failure to produce, evidence sufficient to support the allegations of his petition.

And in such a hearing before the trial court, it is the opinion of this court that the same principle would apply to the weight and sufficiency of the evidence to entitle the petitioner to a writ of error coram nobis, as would apply in any case heard by a court where a jury was waived[7], or by a jury[8]. That is to say, the court's findings as to the sufficiency or insufficiency of the evidence will not be reversed where there is any competent evidence in the record, together with the reasonable inferences and deductions to be drawn therefrom, supporting the court's findings.

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7. *Wilkinson* v. *State*, Okl. Cr., 273 P2d 143; *Crim* v. *State*, 68 Okl.Cr. 390, 99 P2d 185.

8. *Henderson* v. *State*, 95 Okl.Cr. 342, 246 P2d 393; *Walker* v. *State*, 89 Okl.Cr. 284, 207 P2d 341.

This principle seems to have been recognized by the Supreme Court of Kansas in an early case, where it is said:

> "On an application for a writ of coram nobis, the court will not weigh conflicting evidence."

Dobbs, et al. v. *State* (Kans.) 65 P. 658.

It is the rule in this jurisdiction that the burden of establishing the material allegations of a motion to suppress evidence or petition for a writ of habeas corpus or to set aside a judgment, is on the proponent of such motion or petition. *Wirth* v. *State,* 79 Okl. Cr. 59, 151 P2d 819; *Ex parte George,* 83 Okl.Cr. 99, 173 P2d 454; *Ex parte Giles,* 97 Okl.Cr. 292, 262 P2d 909. Such rule would apply to a petition for writ of error coram nobis. 24 CJS §1606 (c-8), and the allegations would have to be established by a preponderance of the evidence. *Ex parte Lindley* (Calif.) 177 P2d 918; *In re De La Roi,* 28 Calif.2d 264, 269, 169 P2d 363. In the within case, it would be necessary to prove to the satisfaction of the trial court that the conviction had been established by perjured testimony produced by the prosecution with knowledge of its falsity.

The main theme of the petition for writ of error coram nobis that covers some 25 pages in the record is to the effect (1) that defendant's co-defendants Burns and York testified falsely against him to the knowledge of the prosecution, and that the prosecution promised them favors for such testimony, and stood by without protesting when they denied that the prosecution had promised leniency for their testimony, and that County Attorney Scanland in the first trial of Hurt where there was a mistrial, and assistant county attorney Martin in the second trial where there was a conviction, had falsely told the jury that they had not promised said Burns and York any favors, and would not intercede for them; (2) that Frank Massad, who was a witness against Hurt, would testify that he also had falsely disclaimed being Hurt's attorney, that Hurt had

always denied his guilt to him; that the prosecution caused him to testify falsely, threatening to have him disbarred and placed him in jail from November 24, 1954 until January 6, 1955, and had him in terror until he nearly lost his mind.

Defendant established that in his testimony confessing his guilt and implicating Robert O. (Bob) Hurt, Adrian Wayne Burns denied before the jury that any agreement or promise to him had been made to persuade his testimony. It was also established that assistant county attorney Martin, in closing the argument of the case, did say of Burns:

> "If he sees fit to enter a plea of guilty, I will not make a single recommendation on his behalf. Is that perfectly clear to everyone?"

It was further established that following the trial of Hurt, and on April 28, 1955, Joe Martin, in company with county attorney Scanland and John Connolly, Esq., attorney for Adrian Wayne Burns, went before Judge Clarence Mills, where Burns withdrew his plea of not guilty in cases Nos. 22,282 and 22,284, and Scanland did recommend to Judge Mills that a sentence of seven years be imposed in each case, the two to run concurrently.

It was established that in the first trial of Hurt, which resulted in a mistrial, county attorney Scanland had told the jury that even though Charles Edwin York, who had been convicted prior to Hurt and by the jury assessed punishment at 45 years in the State Penitentiary, had admitted his guilt and had testified against Hurt, that he would never go before the Pardon and Parole Board in his behalf.

It was established that Scanland after Hurt's conviction in the second trial where he did not participate on account of illness, Scanland had written the Pardon and Parole Board a letter in behalf of York. In this letter he said, in part:

"York gave a full written confession as to his part in the crime and was returned to Oklahoma City where he testified at the Hurt trial, concerning Hurt's part in the affair and it might be well to mention at this point that the jury apparently believed York's story, as it convicted Hurt."

It was established by the evidence of Dick Jones, Esq., former member and presiding judge of this court, that assistant county attorneys Joe Martin and Gene Hassman had appeared in his office in connection with the appeal of Charles Edwin York, which had not been decided, in an effort to get his 45 year entence reduced by reason of his having testified in the Hurt trial on behalf of the State. Witness was of the impression that York had been promised aid for such testimony.

On cross-examination on the hearing for writ of error corum nobis, present county attorney Berry asked Judge Jones:

"Q In the course of that conversation did you make the statement to me in substance that you did not know whether the consideration spoken of by Mr. Martin concerning York was made before the Hurt conviction or after the Hurt conviction? A I don't know whether I understand your question.

Q Do you know of your own knowledge whether or not a deal was actually made between the prosecutor's office and the defendant York? A. No. Now if you'll read my opinion in the habeas corpus case, why, I recite in there that the county attorney's assistants recommended that we reduce the sentence. I haven't testified to anything here that I haven't written in the record."

It was further shown that inquiry was made after York's appeal had been decided and writ of habeas corpus denied (281 P2d 769, 283 P2d 567) by Martin as to time

for appeal to the Supreme Court of the United States; that attorney Carroll Samara filed the petition for writ of habeas corpus; that an assistant county attorney, thought to be Marion Opala, had at one time telephoned concerning an extension of time to file brief in support of the petition.

Carl Avery testified that in 1955 he worked for the King Law Brief Printing Company, and that he picked up from Mr. Marion Opala at the county attorney's office for printing a petition in behalf of Charles Edwin York for certiorari to the Supreme Court of the United States.

Dr. Waldo E. Stephens testified that he visited Frank Massad at the request of Massad's father while he was held in jail. He said that Massad was in protective custody and not subject to all the rules of someone who was confined to jail, and that he took Massad to his home one time. Witness denied that county attorney Scanland asked him to take Massad out, but stated that Massad's parents asked him to do this. He stated that Massad moved to California soon after the last Hurt trial; that he had corresponded with him, and that his address was Suite 1100 Law Building, 139 North Broadway, Los Angeles, California.

Judicial notice is taken of the trial record which shows that during the pendency of the Hurt case Frank Massad was wounded by a would-be *assasin* at the front door of his home, and while in the hospital defendant Hurt visited him there and threatened him, and Massad asked for an armed guard. When he was discharged from the hospital he was held as a material witness.

Charles Edwin York testified that he was confined to the State Penitentiary at McAlester. He stated that he had testified against the defendant Hurt in his two trials. He was asked the leading question if his testimony was false, and answered: "Yes, sir." Also in response to other leading questions be answered, "Yes. sir", to the sugges-

tion that the county attorney and his assistants had made many trips to McAlester to persuade him to give his testimony. And that they promised him that for such effort they would secure a reduction in his sentence. He was asked the further leading question:

"Q Will you state to the judges whether or not you were told by the county attorney's office to deny that promise when you testified? A Yes, sir."

Witness admitted on cross-examination that he had on September 29, 1955 signed an affidavit for his attorney Dave Tant concerning testimony in which Tant sought a new trial for Hurt on the ground of newly discovered evidence.

On re-direct examination York was asked:

"State whether or not you told the county attorney's office and its various members during their negotiations with you for your testimony that you knew nothing connecting Bob Hurt with this crime?

The county attorney objected to this question as leading, but was overruled. York answered:

"Indirectly, sir."

Defendant failed to produce Frank Massad whom he alleged in his petition would swear to matters alleged and set out that were extravagant if defendant had not been given the information by Massad. In fact, if he could have proven the things he alleged Massad would swear to, such would have been most damaging to the State and would probably have resulted in the trial court granting the writ. He produced Massad's ex-wife, Jeanne Brakebill, but her testimony threw no light on the questions at issue.

The State offered the testimony of a number of witnesses.

Percy Borden testified that he was a police officer with the Oklahoma City Police Department, and had par-

ticipated in the York Burns and Hurt matters in 1954 and 1955, and that following York's conviction he had visited with him in the penitentiary at McAlester right after Hurt had been charged. He said that he accompanied Roy Burns, brother of Adrian Wayne Burns. He said that York had sent him word that he wanted to see him. Said he:

"A He advised that he had learned of Wayne Burns' confession and the subsequent charge against Mr. Hurt. And in substance he wanted to know what he could do to help himself; if I could help him.

Q He wanted to know if you could help him? A Yes

Q What reply did you make to Eddie York? A Sir?

Q What reply did you make to Eddie York? A I advised him that I would—I had no authority and had not been advised to make him any offer, and I couldn't help him any, but I would be glad to pass the word to Mr. Scanland. I thought that he was the party that he should—

Q (Interrupting) Did you return to Oklahoma City and do that? A I did."

Granville Scanland testified that he was county attorney of Oklahoma County at the time of the two trials of the defendant Robert O. (Bob) Hurt. He had been succeeded in office by James W. Bill Berry. He said that he conducted the first trial of Hurt that resulted in a hung jury, and that he was confined to the hospital at the time of the second trial, and his assistant Joe Martin conducted that trial. He said that he had read defendant's petition for a writ of error coram nobis. He was asked:

"Q There is an allegation, or several allegations, in that application stating in substance that you, personally, elicited from Charles Edwin York false testimony to be used against Mr. Robert O. (Bob) Hurt

in his trial upon the charge of armed robbery; is that allegation true or false? A It is not true. It is false."

Witness said that he was acquainted with Charles Edwin York and Wayne Adrian Burns who were likewise charged with robbery with firearms growing out of the same crime Hurt was charged with. He further testified:

"Q Did you ever elicit any testimony from Adrian Wayne Burns which was false to be used against Bob Hurt? A I did not.

Q Did you at any time ever make any deal with Adrian Wayne Burns wherein you promised him any special consideration in return for his testifying against Bob Hurt? A I did not.

Q Did you, as county attorney, take a written statement from Adrian Wayne Burns wherein he implicated Robert O. (Bob) Hurt in the same crime? A Yes sir, I did.

Q Would you please describe to the court the circumstances surrounding, both previous to at the time of, and after the taking of that statement? A Yes. At that time York and Burns were charged jointly with the—with that crime. They were the only two charged at that time. Some two months, I would say approximately two months, before the taking of the Burns statement the case was set for trial. They were both, you understand, charged together under one number. That case was set for trial, and at that time a severance was demanded and granted, and upon the granting of the severance the State elected to try Eddie York. York was tried in one of the district courts here and I think on the following, possibly two months later, the Burns case was set on the trial docket. And a day or two or three, I don't recall, possibly one day before the Burns case was set for trial, Mr. John Connolly, an attorney here, advised me that he had just then been employed

to represent Burns and that his client had decided to make a confession and wanted to give a written statement. I think that answers the question, Mr. Berry. If it doesn't we'll—(pause)

Q All right, sir. You say you elected to try York first after the severance was granted; is that correct? A That's correct; yes, sir." * * *

"Q Now the record shows that on April 28, 1955, the defendant Burns appeared before District Judge Clarence Mills, withdrew his plea of not guilty and entered a plea of guilty in cases 22,283 and 84, and that he was sentenced to seven years in each case, to run concurrently on the recommendation of the county attorney. Were you present at the time that plea was made? A Yes, sir.

Q Would you please explain the circumstances of that recommendation? A I'll go back a little bit.

Q Go ahead. From the time you first considered it. A Some time, within a day or two, as I recall, within a very few days at least, after Adrian Wayne Burns gave his statement, his confession, in which he implicated Bob Hurt, a charge was filed against Hurt. Later on, in due course, the Hurt case was tried, and tried the second time. I think, perhaps, from the time of the Burns confession until the second Hurt case was tried, perhaps, close to year had elapsed. Burns did testify in both those cases on behalf of the State of Oklahoma. His testimony in those cases was substantially the same as was given to me in his written confession. After the second trial of Bob Hurt was finished, I then entered into negotiations with Mr. Connolly, the attorney for Burns, as to any recommendation that might be made. We had several conferences. I don't recall how many. And as a result of those conferences, my reviewing the case, my considering the benefit that Adrian Wayne Burns had been to the State of Oklahoma, my consider-

ation of the fact that Burns had then spent some year and a half or so in the county jail, upon consideration of all those things, I finally agreed with Mr. Connolly that I would—that if Burns would go before the court and plead guilty, I would recommend seven years. That I did."

Q All right, sir. Now there is another allegation in this petition that in recommending the seven years you likewise recommended that he be given credit for 584 days' jail time on the seven years; is that true? A That is not true. That is not in the record and that was not done, and he did not get credit on the seven-year term for any jail-time he had done." * * *

"Q Now then, Mr. Scanland, after Eddie York's conviction and his incarceration in the penitentiary at McAlester, did you visit him at the penitentiary? A I did, yes.

Q Now will you please recite for the court the circumstances of that visit, or why you went down there and what you did when you got there, and so forth. * * * A After talking to Percy Bordon, detective, I then made a trip to McAlester to see Eddie York. The reason I went down there is because of the conversation that I had had with Percy Borden, the detective. * * * A I did visit Eddie York in the penitentiary, and that was within, I think, as I recall, it was within a month after I filed on Bob Hurt. I talked to Eddie, I guess for an hour down there. Am I permitted to detail that conversation?

Q I am going to ask that you do. A All right. Eddie York told me then that he was ready to give a complete confession; that he had lied in his own behalf at his trial; that he did participate in it; and that Bob Hurt was the master-mind; and that he wanted to give a complete written confession. I was not equipped that

day. I didn't take a reporter or a stenographer with me, and I told Eddie that I would return in a short time, within a few days or a week, with a—with a reporter and would take his statement. Eddie asked me, among other things, what I could do for him. And I said, 'Eddie, there is nothing I can do for you now. You are too late. You are convicted, and there is just nothing I can do about it. Eddie told me also that he had been double-crossed; that Bob Hurt was supposed to furnish him his lawyer, his alibi witnesses; and that he hadn't done it; and that he wanted to bare his soul and tell the truth for whatever it might be worth to him at any time later. Pursuant to that, I went back to McAlester with a reporter, a Mrs.—she has married since then. She was Mabel Crane. Mrs. Taylor, yes. She is a professional reporter. I went down there some few days later and at that time Eddie York gave a complete statement confessing his part in the crime, repudiating the testimony that he had given in his own behalf at his own trial, and corroborated Wayne Burns in the part that Bob Hurt had played in the Lenn torture robbery. That was taken in shorthand by the reporter, Mrs. Taylor. It was later reduced to typewritten form and taken back to Eddie York, and signed. I don't think I went back. I don't think I went back when it was taken back to him. I think one of the other men in the office went back and took it down there when he signed it."

Witness further testified that the statement bore date of October 2, 1954.

On cross-examination witness Scanland said that in obtaining the statement of York a stenographer was used; that he asked the questions and York dictated the answers. He said that the statement was taken a day or two before the Burns trial was stricken from the docket. He said that Burns' attorney was going to plead his client guilty later

on. He said that he had agreed with counsel to make some kind of recommendation when Burns would plead guilty.

Witness further said that he had appeared before a State Bar Committee that was considering disbarment proceedings against Frank Massad; that he appeared at Massad's request; that he had never learned of the results.

On re-direct examination Mr. Scanland was asked:

"Q Mr. Scanland, going back to the time that Burns made his confession, was any specific agreement reached or any specific deal as to time or anything else? A There was not. The only deal I had with Mr. Connolly was that if Burns wanted to come down and tell the truth, and I thought he was telling the truth; and that later if he went on the witness stand in the event I charged Bob Hurt, and if he then told the truth, I would take all of that into consideration after it was done, and make whatever recommendation I thought was proper."

It was agreed between counsel that Bob York and Burns had testified that they had not been promised anything by the county attorney for their testimony.

John Connolly testified he was an attorney and that he had represented Adrian Wayne Burns and that he discussed with county attorney Scanland the giving of a statement by Burns concerning the crime with which he was charged. He testified:

"Q (By Mr. Berry) Were you able to obtain any specific deal from Granville Scanland in return for a confession from Adrian Wayne Burns? A I was not. Certainly after Burns employed me; that is, the family employed me, and after a conference with Burns, I did talk with the county attorney. I certainly attempted to make—to clarify my position and to see if I could get some recommendation on the basis of him making a statement.

Q And before he made this statement, did you get any commitment from the county attorney's office? A No, Mr. Scanland would not commit himself on it."

On cross examination witness was asked by counsel for defendant:

"Q Mr. Scanland told you that if your client would make that statement and testify against Bob Hurt and it would stand up, he would make a recommendation on his plea of guilty, didn't he? A Not exactly that way, Sid. * * * I went to Mr. Scanland's office and had a long discussion with him in which I—I informed him that the man wanted to make a statement, Burns wanted to make a statement, and would he give Burns any consideration. I tried to pin him down to a certain number of years, and he said he would not. Now he said, 'if he makes a statement, and if I believe it, and if he does testify in this case, certainly I will consider giving him some consideration.' I relied on that, and the historical fact that courts and county attorneys always do that."

Marion Opala testified that he had been an assistant county attorney under Granville Scanland. He denied that he wrote the brief for York in support of his petition for a writ of habeas corpus, or on appeal. He denied preparing any brief for or against York. As to his conversations with the then presiding Judge of this court, he testified:

"A I had two telephone conversations with Judge Jones, or perhaps three, while I was serving as assistant county attorney. And all of these telephone conversations pertained to the State's answer brief in the appeal of Bob Hurt. These conversations were had with Judge Jones sometime in the early part of January, 1956, I believe. In as much as the attorney general requested the county attorney's office to assume the burden and responsibility for the appeal of Bob Hurt, I

called upon Judge Jones several times with reference to, I believe, granting an extension of time in which to file the State's answer brief in the appeal of the defendant herein, Bob Hurt."

Granville Scanland was re-called as a rebuttal witness for defendant Hurt and was asked why he had dismissed perjury charges against Frank Massad. He said that it was because State's witness Phoney Jones had told three different stories.

Witness further testified that he did not make York any promises of any sort. He said that he told him that there was nothing that he could do for him; that it was too late; that he was already convicted.

In reviewing the evidence in this case there are two things that stand out "like a sore thumb", to use a not very nice expression, and which add nothing to the building up of respect and confidence in the integrity of prosecuting officers. The first is the statement by Mr. Scanland in the first trial of Hurt that he would never appear before the Pardon and Parole Board in behalf of York. There was a mistrial. York testified in the second trial for the State. His attorney in effect abandoned his appeal, as has been recited.

Any person of any intelligence whether he was promised help or not promised help would certainly expect help if any could be given, if he did tell the truth and co-operate with the officials; and it would be a strange and unusual prosecuting official who would not give consideration to such aid. For an attorney to advise the jury under such circumstances that he positively will not do something that future conditions might prompt him, even make it his duty in all good conscience to do, as it turned out in this case, is just not understandable. There was no necessity in making such statement. The fact is that Mr. Scanland did write the Pardon and Parole Board in behalf of York, and while the fact that York testified for the State justified this, the record

is that the statement to the jury proved to be ill-advised and not lived up to.

The same may be said about Mr. Martin's statement to the jury as to Burns.

County Attorney Scanland and Mr. Martin appeared before Judge Mills and recommended the amazingly low sentence of seven years for Burns, who admitted to torturing the robbery victim with the red hot curling iron, though he swore that Hurt suggested the method of torture. This in the face of the fact that York, the flunky in the case, had received 45 years, as did Hurt. One of the reasons given for the low recommendation was that Burns had already spent over a year and a half in jail. It now develops from the record that the Pardon and Parole Board has now given Burns credit for the jail time, and he is already out of the penitentiary. The Pardon and Parole Board may be expected to give consideration to credit for jail time, and the trial court, in view of the policy of the Board, should not give consideration to time spent in jail awaiting trial, in fixing sentence. If there are inequities in the matter of assessment of penalties among the co-defendants that is now a matter that may receive the attention of the Pardon and Parole Board, giving attention to the nature of the crime for which conviction had.

As much as we condemn the careless and ill-advised statements to the jury by the prosecutors, this would not entitle defendant to a new trial unless the county attorney had in the face of such statements induced York and Burns, one or both, to turn State's evidence by reason of promising them aid. As indicated in *People* v. *Savvides, supra,* there is a vast difference in a witness turning State's evidence in the hope of leniency, and where he had been promised leniency, and when the question was raised deceived the jury. In *Savvides* the prosecuting attorney had in court admitted that he had made a deal, but stood mute when the witness denied it before a jury. The facts were admitted.

Here County Attorney Scanland swears that he made no promises. As to Burns, he is corroborated by John Connolly, Esq., Burns' attorney. And as to York, York was already convicted. York, who admits to perjury and whose history as shown by the trial record is anything but good, says that he was promised help on his appeal. Whether the help attempted by the County Attorney's office was in gratefulness for the co-operation of York in the two trials or by reason of a promise, was the question. The issue has been resolved against the defendant by the trial court, and there being evidence to support the judgment of the court denying the writ of error coram nobis, said judgment must be and is affirmed.

BRETT, P.J., and NIX, J., concur.

NIX, J., concurring

Though I am in accord with the Powell opinion, I feel compelled to comment upon certain questions of law presented by this case, which I deem to be of the utmost importance to our jurisprudence. The urge to comment on this matter is driven by the desire to alert the courts of the injustice that might prevail if an attorney betrays his client's confidence and uses against him, that which was believed to be privileged. Though the rule may have been applied in a case where the crime charged was heinous in its conception and fiendish in its execution, once the rule is adopted it may well haunt the court in future cases, thereby opening the door for great wrongs to be done by those who would discord ethics of the profession of law.

Plaintiff in error contends that the court was in error by permitting Frank Massad, an attorney, who Hurt contends represeneed him during early stages of the case, to testify as to matters related to him by Hurt. It appears from the record that Massad did serve as attorney for Hurt but was later let out—not fired, but as put by Hurt "just kinda eased him out." Some time later, Massad placed upon him-

self a tape recorder concealed beneath his clothing, called Hurt. They met, rode around in a car, stopped and had a sandwich. During all this time, unknown to Hurt, the conversation was being recorded by Massad, Hurt's former attorney. It is obvious from the transcribed recording that Massad propounded many questions of a surreptitious nature and thereby *illicited* from Hurt conversation which he desired. During the trial of Hurt, Massad was permitted to testify as to the contents of the recording which in the opinion of the writer was most damaging to the defendant. After Massad testified and identified the recording, it was edited and introduced in evidence. Massad denied being the attorney for Hurt at any time, but an examination of the record can leave little doubt that he was acting as attorney for Hurt during a part of the time before and after charges were filed against the defendant. Several witnesses, including a court reporter, newspaper man, and district judge testified Massad represented Hurt on the 18th of May, 1954, *In re Habeas Corpus of Hurt* arising out of these charges. An attorney, Wayne Wheeling, who officed in the same suite with Massad, testified that Mr. Hurt was a frequent visitor to Massad's office and he knew Massad was acting as Hurt's legal advisor. Hurt testified he had 75 to 100 conversations with Massad, considered him his attorney and at the request of Massad purchased a recording device for Massad to use in connection with his case. That Massad represented him at arraignment and to make bond. Massad was listed on the docket in Justice court as one of the attorneys for Hurt. Though Massad denied this, the evidence was clearly to the contrary. Even exerpts from the tape recording *illicited* by Massad from Hurt verified attorney-client relationship. (CM 702, date Oct. 20, 1954)

"Massad: Have you talked to Dave about them subpoenaing me?

Hurt: Oh, he talked to me a half a dozen times about that. But I don't know what angle he's shootin', but he told me you — — sure couldn't testify.

Massad: Well, ah, I can't see it either, Bob. Now look, I know the law says this: that a privileged communication between attorney and client, when the privilege is invoked, can be made public only by the client, and not by the lawyer."

Surely in view of this statement recorded by Massad, and introduced by the state, Massad's position, even as late as October 20, 1954, was made clear as Hurt's attorney, to the extent, that the communication was privileged in his opinion. However, this matter was passed on by the trial judge, then said cause was appealed to this court and the matter affirmed and consequently *res judicata* and cannot be considered by this court under coram nobis proceeding. Your writer was not a member of the court at the time the case was affirmed. I do not agree with the court's opinion in affirming the appeal as far as Massad's testimony being competent; undoubtedly it was a deciding factor in the minds of the jury. I definitely think it was privileged communication and should have been excluded. To have held otherwise in my opinion, did violence to the time honored principle of confidential relation between attorney and client. If the dignity of the law profession is to be preserved, a client who has become involved with the law must feel at liberty to advise and counsel with an attorney in regard to said infractions and to communicate with him freely, with the utmost confidence and assurance, that the communications cannot be divulged as evidence without the consent of the client. It has long been the duty and business of those engaged in the practice of the profession of law when engaged and relied upon for that purpose, to counsel with and give advice to those who have been charged with an infraction of the law, and to enable the attorney to properly advise and represent the client in court, or when prosecutions are threatened, it is conducive to the dignity of the law profession, and to the administration of justice, that the client shall be free to communicate to his attorney, all the details and facts directly or indirectly

pertinent within his knowledge, to his attorney and that he must be cloaked with greater protection than the confidence vested in his attorney; but in addition thereto be assured under the law that said communications made by him shall not be used to his prejudice. The seal of silence is upon it, subject to be broken, but the consent of the client only.

The court justified its opinion upon the theory that though Massad, during parts of the case, was Hurt's attorney, but that the relationship of attorney and client had ceased to exist at the time Massad, through use of artifice, recorded the conversation between he and Hurt. I feel better law would have prevailed had the court followed the law handed down by many other jurisdictions and recited in 58 Amer. Jur. 467:

> "Ordinarily the protection given by the law to communications made during the relationship of attorney and client is perpetual and does not cease with the termination of the suit, nor is it affected by the partys ceasing to employ the attorney and retaining another, or by any other change of relations between them, or by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself in whose favor it is there placed."

To your writer this language is clear, simple, just and right, but unfortunate as it may be, the court has adopted the contrary and the hand that writ has moved on and this court as it is now composed is helpless to review the matter under the pleadings before us. We have done considerable research on coram nobis as Judge Powell's decision so amply reflects, and are all in agreement with the limitation of that which can be considered by way of coram nobis.

The authorities contend the ancient remedy of coram nobis, though having a definite place in keeping with innumerable decisions, by the courts in which due process

[APPENDIX]

rendered, has been affirmed and expanded as one of the bulwark of American liberty, yet it was never intended to provide litigants with a substitute for appeal, a new trial or other statutory remedy, nor can it be used for the purpose of correcting errors of law. In its early usuage, criminal cases were not the usual meter of this writ. However, the courts in their cautious preservation of human liberty have been most receptive to remedies contemporary or ancient in order that justice might be best served. However, coram nobis must not be the instrument by which litigation might be drawn out over endless periods by subjecting the judiciary to the task of reviewing matters time and time again that have long since been *res judicata*.

I am in full accord with the opinion of Judge Powell as to the denial of relief upon the issues which we are permitted to consider under the writ of coram nobis. However, I trust the matter relative to privilege communication between attorney and client will be reviewed by the Supreme Court of the United States and clarified.

"EXHIBIT C"

PENITENTIARY

STATE OF OKLAHOMA, }
OKLAHOMA COUNTY, } ss.

In the District Court of the Seventh Judicial District of the State of Oklahoma, sitting in and for Oklahoma County.

THE STATE OF OKLAHOMA,
Plaintiff,
vs.
ROBERT O. (BOB) HURT,
Defendant.

No. 22662

JUDGMENT AND SENTENCE

Now, on this 16 day of March, 1955, the same being a judicial day of the above court, and the time appointed for judgment in the above entitled cause, and said cause coming on for judgment, and the prisoner, ROBERT O. (BOB) HURT, being personally present in open court, and having been legally charged with the offense of ROBBERY WITH FIREARMS and having been apprised by the Court of his right to counsel; having been duly arraigned thereon and having pleaded not guilty and having been duly and legally tried and convicted of said offense, in said Court, the prisoner is now informed of the nature of the charge, of his plea and of the verdict and is asked by the Court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and alleging no sufficient cause why judgment and sentence should not be pronounced against him and none appearing to the Court, the Court does now hereby adjudge and sentence the said ROBERT O. (BOB) HURT for the said offense by him committed.

It is Therefore, Hereby Considered, Ordered, Adjudged and Decreed by the Court that the said ROBERT O. (BOB) HURT be committed to and be imprisoned in the State Penitentiary at McAlester, in the State of Oklahoma and confined in said Penitentiary for the term of FORTY-FIVE (45) YEARS for said offense of ROBBERY WITH FIREARMS said term of sentence to begin at and from DELIVERY TO THE WARDEN and that said defendant pay the costs of this prosecution, taxed at $, for which judgment is hereby rendered against the said defendant; and thereupon the defendant is by the Court notified of his right of appeal.

It is further Ordered Adjudged and Decreed by the Court that the Sheriff of Oklahoma County, State of Oklahoma, transport said Defendant to the said State Penitentiary at McAlester, in the State of Oklahoma, and that the warden of said Penitentiary detain the said Defendant according to this judgment, sentence and order, and that the Clerk of this Court, do immediately certify, under the seal of the Court, and deliver to the Sheriff of Oklahoma County, State of Oklahoma, two copies of this judgment, sentence and ordered, one of the copies to accompany the body of the said Defendant to the said penitentiary at McAlester, in the State of Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said Defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, State of Oklahoma, for the transportation and imprisonment of the said Defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

/s/ Wm. L. Fogg
Wm L. Fogg, District Judge

(SEAL OF COURT CLERK)

ATTEST:
CLIFF MYERS
Court Clerk.

By: /s/ PAULINE RICE
Deputy

STATE OF OKLAHOMA }
OKLAHOMA COUNTY, } ss.

I, Cliff Myers, Court Clerk of the Seventh Judicial District of the State of Oklahoma, do hereby certify the above and foregoing to be true, correct, full and complete copy of the original judgment and sentence in the case of the State of Oklahoma vs ROBERT O. (BOB) HURT, as the same appears of record in my office.

Witness my hand and official seal this 16 day of March, 1955.

CLIFF MYERS
CLERK

BY Deputy.

ENDORSEMENTS:
No. 22,662

In District Court Oklahoma County, Oklahoma

THE STATE OF OKLAHOMA
vs
ROBERT O. (BOB) HURT
Defendant

JUDGMENT AND
SENTENCE

RECORDED: BOOK 541 PAGE 163

* * * * * * * * *

August 9th, 1957

[APPENDIX]

CERTIFICATE

I, Andy Payne, Clerk of the Criminal Court of the State of Oklahoma, do hereby certify that the above and foregoing is a true correct and perfect copy of a judgment and sentence entered in No. 22,662, District Court of Oklahoma County, Oklahoma, and affirmed on appeal by the Criminal Court of Appeals in No. A-12,259 as the same appears in my office.

Andy Payne,
Clerk of Criminal Court of
Appeals of the State of Oklahoma
By Ethel C. Hammett
Ethel C. Hammett, Deputy Clerk.

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JOHN T. FEY, Clerk

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 402

ROBERT O. (BOB) HURT,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

PETITION FOR REHEARING

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Attorney for Appellant.

November, 1957.

INDEX

	PAGE
Petition for Rehearing	1
I. That appellant stands deprived of his liberty without due process of law because the court permitted in evidence a recording elicited from him by one Frank Massad, then or theretofore his attorney, by artifice, which said deprivation is cognizable and curable by this Honorable Court	1
II. That appellant has been deprived of his liberty without due process of law in that the county attorney was permitted to introduce against him perjured testimony at a time when said officer, or his assistant in charge, knew the same to be false; which said deprivation is cognizable and curable by this Court	7
III. That appellant contends that he was deprived of a trial before a fair and impartial jury, that this is a violation of the Fourteenth Amendment to the Constitution of the United States, and that said deprivation is cognizable and curable by this Honorable Court	20
Conclusion	24
Certificate	25

INDEX CONTINUED PAGE

AUTHORITIES

CASES:

Amrine v. Tines, 131 F.2d 833 1-2

Baker v. Hudspeth, 129 F.2d 781 20-21

Chessman v. Teets, Warden, 77 Sup. Ct. 1127 23

Mooney v. Holohan, 79 L. Ed. 794, 294 U.S. 112-113 7-8

New York v. Savvides, Court of Appeals of New York, July 11, 1956, 136 N.E.2d 853 and 154 N.Y.S. 2d 887 (American Bar Journal, December, 1956, Vol. 42, p. 1157) 8-11

Powell v. Alabama, 77 L. Ed. 165 2-3

State ex rel. Tucker v. Davis, 9 Okla. Crim. Rep. 94, 44 L.R.A. (N.S.) 1083, 130 Pac. 962 3

Yordan v. Hess (N.Y.), 13 Johns 492 ..... 3-4, 7

In the
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OCTOBER TERM, 1957

No. 402

ROBERT O. (BOB) HURT,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

PETITION FOR REHEARING

Comes now the appellant, Robert O. (Bob) Hurt, petitioning the Court to grant him a rehearing herein, and for cause he says:

That he now urges upon the Court in support of this petition three (3) substantial grounds available to him and not previously presented in detail, as follows, to-wit:

I.

That appellant stands deprived of his liberty without due process of law because the court permitted in evidence a recording elicited from him by one Frank Massad, then or theretofore his attorney, by artifice, which said deprivation is cognizable and curable by this Honorable Court.

That to support this conclusion of law, appellant cites:

(a) *Amrine* v. *Tines,* 131 F.2d 833, same being an opinion delivered by Judge Murrah for the Tenth Circuit Court of Appeals, and wherein this language is used:

"(5-7) In a Federal criminal proceedings, if the accused 'is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.' *Johnson* v. *Zerbst, supra*, 304 U.S. at page 468, 58 S. Ct. at page 1024. For the purposes of this case we may assume without deciding that the rule adopted for guidance of the Federal courts under the requirements of the Sixth Amendment, when translated in terms of due process of law under the Fourteenth Amendment, *applies with equal force to trials in a state court. Powell* v. *Alabama, supra. Cf. Carey* v. *Brady, supra; Boyd* v. *O'Grady*, 8 Cir., 121 F.2d 146. We do not suppose that because an accused waives counsel and elects to represent himself that his trial and conviction could not result in a denial of due process of law in a state court as well as a Federal court. Due process of law, as we comprehend it, does not necessarily include or exclude representation by counsel. The substance of due process may be denied although the accused is represented by a coterie of counsel, yet he may have it although unaccompanied by counsel. Due process, or the lack of it, is based upon substance, not form" (Italics appellant's).

(b) *Powell* v. *Alabama*, 77 L. Ed. 165 (cited by Judge Murrah), where MR. JUSTICE SUTHERLAND, speaking for this Court said:

"Chief Justice Anderson, after disclaiming any intention to criticize harshly counsel who attempted to represent defendants at the trials, said: 'The record indicates that the appearance was rather *pro forma* than zealous and active.' Under the circumstances disclosed, we hold that defendants were not accorded the

right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities."

(c) Page 172 thereof, where the learned judge continues:

"To hold otherwise would be to ignore the fundamental postulate, already averted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard'."

(d) Page 165 of the opinion; and there the judge cites *State ex rel. Tucker* v. *Davis*, 9 Okla. Crim. Rep. 94, 44 L.R.A. (N.S.) 1083, 130 Pac. 962; and I quote from the words of Judge Furman there recorded (130 Pac. 963):

"The right to be heard by counsel would, in the language of Saint Paul, 1 Cor. 13, 1, 'become as sounding brass, or a tinkling cymbal', if it did not include the right to a full and *confidential consultation* with such counsel, with no other persons present to hear what was said. This is a material, substantial right, essential to justice" (Italics appellant's).

(e) *Yordan* v. *Hess* (N.Y.), 13 Johns 492, and relied on by the Criminal Court of Appeals of Oklahoma in its first opinion:

"The confessions by plaintiff to Brackett were made after he ceased to be his attorney; and although they were, substantially, a reiteration of what had been communicated whilst the relation of attorney and client existed, yet they appear to have been voluntary disclosures, *in no way sought for or drawn out by the witness*. An attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated

to him in that capacity. But this is the privilege of the client, and if he chooses, after this relation has ceased, to volunteer any communications, he is not protected, although they may be, in substance, the same as were given while that relation subsisted. The reason for the rule then ceases. *If a repetition of the information should appear to have been drawn out by any artifice, for the purpose of being used as evidence, it ought not to be received. But when it is perfectly voluntary and unsought for, there can be no solid ground for excluding the evidence*" (Italics appellant's).

(f) That here appellant digresses to suggest: That 'tho he, under the Constitution, is conceded the right to confer confidentially with attorney Massad, yet if Massad, to free himself from criminal and unprofessional involvment, claiming a special dispensation so to do, can thereafter by artifice elicit a recorded repetition of said confidential communications from him to be used as evidence against appellant; then the Fourteenth Amendment (in this particular) ceases to be a protective mantle and becomes as empty and meaningless as an idiot's mouthings. *Brown* v. *Mississippi*, 80 L. Ed. 682, is thought to be authority and principle for this conclusion.

That to support said statement of fact appellant quotes:

(a) From the opinion of the Criminal Court of Appeals, delivered by Jones, Presiding Judge, as the same appears on page v of the appendix to appellant's jurisdictional statement:

"The most damaging evidence to defendant's cause, however, came from the testimony of Frank Massad,

an attorney of Oklahoma City. Over the vigorous objection of counsel for the accused, Massad was permitted to detail conversations which he had with Hurt on many occasions. During one of these conversations Massad, unknown to Hurt, was equipped with a wire recorder which recorded incriminating statements made by Hurt. This recording was edited by the trial court in the absence of the jury and the edited version of the conversation was played to the jury over the objection of Hurt.

"Hurt's defense was an alibi. He contended that at the time of the robbery he was playing pool in Jerry's Pool Hall in Oklahoma City with one Art Nugent. Several witnesses corroborated the defendant on his alibi. Defendant specifically denied any connection with the robbery but admitted knowing Burns and testified that he had been hired by attorney Tant to try to find some evidence to sustain an alibi for Burns to be introduced at the trial of Burns.

"In connection with the first assignment of error, the record discloses that at the time objection was made to the testimony of Massad, the jury was excused and the court heard many witnesses on the question as to whether Massad was the attorney for Hurt. Massad denied that he was ever the attorney for Hurt but contended the conversations he had with Hurt were because of relationship between Hurt and Burns and Hurt was attempting to help prepare for the trial of Burns by talking to Massad and Tant who were representing Burns. On the other hand, Hurt testified that the night that Burns was arrested and charged with the crime, Massad came to Hurt's home and informed Hurt that some of the policemen were trying to implicate Hurt in the robbery and that on that occasion Hurt told Massad he wanted him for his attorney and Massad agreed. However, on cross-examination

Hurt testified that Massad did not become his attorney until charges were filed against Hurt on May 13 1954, and that when perjury charges were filed against Massad in Oklahoma County on August 12, 1954, that he no longer considered Massad as his attorney because he felt that on account of the bad publicity which Massad had received, Massad would do him more harm than good. Hurt testified, however, that he never did discharge Massad as his attorney but that he just let him sort of 'ease out.' At the conclusion of the hearing in the absence of the jury the trial court made its ruling in which he divided the testimony of Massad into three periods. *The Court* held that during the *first period* of time which commenced with the arrest of Burns and ended on May 13, 1954, Massad was not acting as attorney for Hurt and that any conversation which occurred during that period was admissible in evidence against Hurt. The *second period* of time was from May 13, 1954, to August 12, 1954, and the Court found that during that period of time, contrary to the testimony of Massad, that the relationship of attorney and client did exist between Massad and Hurt and that any conversation between them during that period was privileged and inadmissible as evidence against Hurt over objection."

(b) As supplementary thereto, from the specially concurring opinion on petition for rehearing delivered by Nix, J., as the same appears on pages xlvii-xlviii of the appendix to appellant's jurisdictional statement:

"'Massad: Have you talked to Dave about them subpoenaing me?

Hurt: Oh, he talked to me a half a dozen times about that. But I don't know what angle he's shootin', but he told me you * * * sure couldn't testify.

Massad: Well, ah, I can't see it either, Bob. Now look, I know the law says this: that a privileged communication between attorney and client, when the privilege is invoked, can be made public only by the client, and not by the lawyer.'

"Surely in view of this statement recorded by Massad and introduced by the state, Massad's position, even as late as October 20, 1954, was made clear as Hurt's attorney, to the extent, that the communication was privileged in his opinion."

Appellant digresses to comment: This quoted testimony (as well as the entire record) clearly demonstrates that whatever Hurt said to Massad was elicited by artifice practiced to procure said recording that, he, Massad, might use it in evidence against his former client and was, therefore, inadmissible under *Yordan* v. *Hess, supra.*

II.

That appellant has been deprived of his liberty without due process of law in that the county attorney was permitted to introduce against him perjured testimony at a time when said officer, or his assistant in charge, knew the same to be false; which said deprivation is cognizable and curable by this Court.

That to support said conclusion of law appellant cites:

(a) *Mooney* v. *Holohan,* 79 L. Ed. 794, 294 U.S. 112-113, where this appears:

"Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That

requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana*, 272 U.S. 312, 316, 317, 71 L. Ed. 270, 273, 47 Sup. Ct. 103, 48 A.L.R. 1102. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. *And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment.* That Amendment governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers' " (Italics appellant's).

(b) *New York* v. *Savvides*, Court of Appeals of New York, July 11, 1956, 136 N.E.2d 853, and 154 N.Y.S.2d 887 (American Bar Journal, December, 1956, Vol. 42, page 1157), where the Court said:

"(1, 2) The conviction cannot stand. The administration of justice must not only be above reproach, *it must also be beyond the suspicion of reproach.* The prosecutor should have corrected the trial testimony given by Mantzinos and the impression it created. He should have, by immediate statement of his own or by further appropriate examination of Mantzinos, forthrightly

exposed the lie, so that the court and jury would have known that the witness had reason to expect lenient treatment for 'continued * * * co-operation.' His failure to do so constitutes 'error so fundamental, so substantial', that a verdict of guilt will not be permitted to stand. *People* v. *Creasy*, 236 N.Y. 205, 221, 140 N.E. 563, 569.

"(3) It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. Nor does it avail respondent to contend that defendant's guilt was clearly established or that disclosure would not have changed the verdict. The argument overlooks the variant functions to be performed by jury and reviewing tribunal. 'It is for jurors, not judges of an appellate court such as ours to decide the issue of guilt.' *People* v. *Mleczko*, 298 N.Y. 153, 163, 81 N.E. 2d 65, 70. We may not close our eyes to what occurred; regardless of the *quantum* of guilt or the asserted persuasiveness of the evidence, the episode may not be overlooked. That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

"Although, in the view we have taken, it may not be necessary to determine the actual effect of the prosecutor's conduct, the resulting prejudice to Savvides may not be characterized or discounted as harmless.

"Where a promise of leniency or other consideration is held out to a self-confessed criminal accomplice for his co-operation, there is grave danger that, if he

be weak or unscrupulous, he will not hesitate to incriminate others to further his own self-interest. Long experience in granting leniency to 'co-operative' accomplices has undoubtedly shown the hazards in the practice to be more than offset by benefits to society in the detection and punishment of crime. It requires no extended discussion, however, to establish that the existence of such a promise might be a strong factor in the minds of the jurors in assessing the witness' credibility and in evaluating the worth of his testimony. The failure to disclose an 'understanding' or a promise cannot but seriously impair the jury's ability to pass upon this vital issue, and that is precisely the infirmity under which the jurors labored in the case before us.

"It is true that in his interrogation the judge elicited some vague answers which might have induced the jury to believe that Mantzinos was 'hoping' for leniency, and in his charge he indicated his own belief that the witness entertained such a hope. *But that is a far cry from positive knowledge that Mantzinos had actually been assured consideration in return for continued cooperation and that he had deliberately lied about the matter on the stand.* Had the jury been apprised of the facts, it would have been in a better position to evaluate his veracity. In the first place, the conditional promise of consideration, the jurors could have concluded, furnished strong motivation for 'co-operation' exceeding the bounds of truth. And, in the second place, even more significant because more revealing of the man, knowledge that Mantzinos had lied under oath might well have lowered the jurors' assessment of his regard for the truth in general and, by that token, affected their appraisal of his other testimony incriminating defendant.

"(4) *Convincing though proof of guilt may be, and there can be no denial of its strength in this case, we could here affirm 'only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt.' People* v. *Mleczko, supra*, 298 N.Y. 153, 163, 81 N.E.2d 65, 69. We were not in Mleczko, and we are not now, prepared to announce such a doctrine" (Italics appellant's).

That to support said statement of fact appellant presents:

(a) In the opinion of which Judge Powell was author as the same appears in appendix to appellant's jurisdictional statement at page xlii, this appears:

"It was agreed between counsel that both York and Burns had testified that they had not been promised anything by the county attorney for his testimony."

(b) Charles E. York, called as witness upon the trial of appellant, testified at transcript, pages 1003-1004, as follows:

Q. "Bob Hurt alleges that you were used as a witness against him; that your testimony was false insofar as his connection with the robbery was concerned; is that true?

A. Yes, sir.

Q. That the County Attorney made many trips, he and his Assistants to McAlester to persuade you to give this testimony?

A. Yes, sir.

Q. And that they promised you that, if you would so testify, in order to get you to testify, they would secure a reduction of your sentence; is that true?

A. Yes, sir.

Q. And that on your testimony as a witness you denied that promise?

A. Yes, sir, I did.

Q. Will you state to the Judges whether or not you were told by the County Attorney's office to deny that promise when you testified?

A. Yes, sir.

Q. And that's the reason you did it?

A. Yes, sir, it was."

(c) Judge Dick Jones, formerly Presiding Judge of the Criminal Court of Appeals, author of the first opinion here, at transcript, pages 958-959-960, testified as follows:

Q. "(By Mr. White) Will you state to the Judges whether or not shortly after that trial you had visitors from the County Attorney's office to discuss a matter pending in your court?

A. Yes, sir.

Q. Tell His Honor who they were.

A. Mr. Martin and Mr. Hassman.

Q. Will you tell His Honor what they wanted or what they said they wanted?

A. The * * * Mr. York's case had been assigned for oral argument. They came to our courtroom that day and Mr. Tant was not present and the case was submitted without argument. After the argu-

ments had concluded they came into my office and discussed the case with me.

Q. Did they make any suggestion about how the case should be ruled on and why?

A. They told me that they felt obligated to assist York on his appeal and that's why they had come to the Court on that occasion.

Q. Did they make any statement to you with reference to Mr. Scanland's condition?

A. Yes, sir.

Q. In that connection, did they state to you that—

Mr. Berry: (Interrupting) I'm going to object to him leading his witness.

Judge Fogg: Don't lead him. Just let him testify as to what was said.

Q. (By Mr. White) What did they say was Mr. Scanland's condition?

A. I'll give you my best recollection of what occurred.

Q. That's what I want.

A. Mr. Martin came in my office first and we started to speaking and then Mr. Hassman came in after he had been there two or three minutes. And they said that Mr. Scanland was in the hospital and that they * * * that they had had a conversation with Mr. York. They had told Mr. York that if he would come clean and testify in the Hurt case and tell the truth about the whole transaction, they would do what they could to assist him on his appeal; get his sentence reduced.

They asked me to reduce the sentence, and I told them that I wouldn't consider it at all be-

cause the crime was too inhuman and barbaric; that a man had already put the County to expense of being tried, and I would not concur in any recommendation that sentence be reduced at all.'

Q. Now state, Judge Jones, whether or not any statement was made by these gentlemen, or either of them, about what would happen to Scanland if their promise was not kept.

A. They expressed a fear that Mr. York would escape the penitentiary, or one of his friends might even go to the hospital where Mr. Scanland was seriously ill and cause him harm if they were not successful in giving York assistance on the appeal.

Q. As they had promised him?

A. Yes, sir."

(d) That notwithstanding the fact that both Mr. Martin and Mr. Hassman were in the courthouse or in the immediate vicinity thereof when Judge Jones testified, neither took the stand to contradict his statements.

(e) That the same Mr. Joe Martin, identified by Judge Dick Jones, in arguing to the jury and to persuade conviction of appellant, instead of exposing York's falsehood, corroborated the same as follows (Tr. 976-977):

"Now York came here and testified, and I'll tell you why. He's not the nicest guy in the world, and far from it, and you've never heard me say that he was, or you've never heard anybody say, who was associated with the prosecution of the case, that he is anything but what he is, a despicable thug. But he did that, and he came up here, in my judgment, solely for vengeance, solely to get even because he had been promised—and the evidence is in there—that he had been promised by

this defendant and his associates and others that they would provide an alibi for him. And when the thunder finally hit him, when he realized that the prosecution was so thorough, and that police work by the Federal Bureau of Investigation and State Crime Bureau and the Sheriff's office and the Police Department of your City had him backed right to the wall, they couldn't get witnesses, and the net result was he was thrown to the wolves in an effort to protect the third man, and he got forty-five years for his trouble.

"And when he sat in the penitentiary for a certain length of time it finally got through his thick, stupid skull that he had been had, and he was mad, and he was ready to 'blow the whistle.' But not until he found out about Burns."

(f) That Mr. Granville Scanland, County Attorney of Oklahoma County, Oklahoma, during the prosecution of appellant, testified at transcript, pages 1038 to 1042, inclusive:

Q. "You took a written statement from Burns too, didn't you?

A. Yes, sir.

Q. You wrote it yourself, didn't you?

A. No, sir.

Q. Did you dictate it?

A. I did.

Q. You dictated it, didn't you?

A. I asked the questions and Mr. Burns dictated his own answers.

Q. When was that taken with reference to the time when Burns' trial was stricken?

A. A very short time before, a day or two, or three.

Q. It was at night before you struck it at 9:00 o'clock the next morning, wasn't it?

A. It could have been, if that's what the record shows.

Q. Isn't that true?

A. Mr. White, I don't recall exactly.

Q. That's what Burns testified. Now I didn't know anything about it or my client didn't know you were taking these statements, but it was taken on the night before Burns was due to go on trial at 9:00 o'clock the next morning, wasn't it?

A. If that's what the record reflects, that's correct. They are both a matter of record.

Q. And that's the reason the case was stricken, wasn't it?

A. No. No, it isn't. In a way it was. It was stricken because at that time it was not necessary to go to trial the next day.

Q. It was stricken because he made that statement.

Mr. Berry: I'm going to object to the form of the question.

Judge Fogg: Don't argue with the witness.

Q. (By Mr. White) *I'm asking you, isn't that true?*

A. *That's partially true, yes.*

Q. *What's the other part; what other thing motivated it?*

A. *The fact that his attorney was going to plead him guilty later on.*

Q. *Oh, yeah, and you and his attorney agreed that when he did plead him guilty you'd make some sort of recommendation?*

A. *That's right.*

Q. *That's right?*

A. *Of a sort.*

Q. *Now you did do that?*

A. *How's that?*

Q. *You did do that?*

A. *Yes.*

Mr. White: And Burns knew that. That's all, gentlemen.

The Witness: I don't know what Burns knew.

Mr. White: I hope you gentlemen got the significance of that.

Q. (By Mr. White) Mr. Scanland, you charged, or a member of your office, charged Frank Massad with perjury, didn't you?

A. Yes.

Mr. Berry: I renew my objection now, Your Honor, to all of this Frank Massad testimony.

Judge Fogg: Overruled.

Q. (By Mr. White) And that charge was held over Massad until he appeared and testified against Hurt, wasn't it?

A. Sid, I don't know what you mean by 'held over.' If you mean as a club, no.

Q. Well, it pended on the docket?

A. That's right.

Q. And in December of last year you dismissed it, didn't you?

A. That's correct.

Q. Now did you charge Frank Massad with improper conduct before the State Bar?

A. No, sir.

Q. Did you sign a complaint charging him?

A. No, sir.

Q. Did you join Judge Traub in charging him?

A. No, sir.

Q. You did appear and testify for Frank Massad, didn't you?

Mr. Berry: If the Court please, I want to object to all of this testimony about the Bar Association proceedings. Mr. White is a very able and astute lawyer, and he knows full well that all of those proceedings are secret and privileged, and that there is no way to get at the testimony of a complaint.

Mr. White: They are not privileged in this type of case.

Judge Fogg: Now wait a minute. The question can be asked as to whether he was there, but I am not going to allow him to go into the detail of what occurred.

Mr. Berry: That's why I wanted to get him to stop now before he started to testify.

Mr. White: I want to make my record. Has the Bar Association got any rule that suppresses this sort of evidence? If they have, the Legislature ought to know about it.

Judge Fogg: Go ahead and ask him the question.

Q. (By Mr. White) Did you appear before the State Bar Association as a witness for Frank Massad? I'm asking first did he appear?

A. I appeared before a committee of the State Bar as a witness.

Q. For Frank Massad at his request?

A. Yes, that's right.

Q. And you testified in his behalf, didn't you?

A. Put it this way, Sid: I testified."

(g) That Mr. Joe Martin, already identified herein and in charge of the prosecution of the appellant, in arguing to the jury the question of appellant's guilt at transcript, page 976, instead of exposing the falsity of Burns, himself imposed upon the jury as follows:

"Now, I have said before publicly, and I repeat, that if Adrian Wayne Burns does not go to the penitentiary, I will resign from the County Attorney's staff and I will never again practice law in this State.

"Now then, in answer to your question, Mr. Mounger, I will say this: That if Adrian Wayne Burns elects to come before a tribunal in this county and enter a plea of guilty, that I will not make one single recommendation in his behalf. Now does everybody understand that once and for all?"

(h) That, even 'tho there was no denial of Scanland's promise to Burns, as though to corroborate him, that gentleman together with his assistant, Mr. Martin, made good the promise and in recognition thereof, in his opinion at page xlv of the appendix to appellant's jurisdictional statement, Judge Powell had this to say:

"County Attorney Scanland and Mr. Martin appeared before Judge Mills and recommended the amazingly low sentence of seven years for Burns, who admitted to torturing the robbery victim with the red hot curling iron, though he swore that Hurt suggested the method of torture. This in the face of the fact that York, the flunky in the case, had received 45 years, as did Hurt. One of the reasons given for the low recommendation was that Burns had already spent over a year and a half in jail. It now develops from the record that the Pardon and Parole Board has now given Burns credit for the jail time, and he is already out of the penitentiary. The Pardon and Parole Board may be expected to give consideration to credit for jail time, and the trial court, in view of the policy of the Board, should not give consideration to time spent in jail awaiting trial, in fixing sentence. If there are inequities in the matter of assessment of penalties among the co-defendants that is now a matter that may receive the attention of the Pardon and Parole Board, giving attention to the nature of the crime for which conviction had."

III.

That appellant contends that he was deprived of a trial before a fair and impartial jury, that this is a violation of the Fourteenth Amendment to the Constitution of the United States, and that said deprivation is cognizable and curable by this Honorable Court.

That to so convince the Court, appellant calls attention to the language of Judge Murrah, delivering the opinion of the United States Circuit Court of Appeals for the Tenth Circuit in *Baker* v. *Hudspeth*, 129 F.2d 781:

"(1, 2) There is no right more sacred to our institutions of government than the right to a public trial by a fair and impartial jury; no wrong more grievous than its denial, and no greater duty is enjoined upon the courts than to preserve that right untarnished and undefiled. The denial of a fair and impartial trial, as guaranteed by the 6th Amendment to the Constitution, is also a denial of due process, demanded by the 5th and *14th Amendments*, and the failure to strictly observe these constitutional safeguards renders a trial and conviction for a criminal offense illegal and void and redress therefor is within the ambit of habeas corpus" (Italics appellant's).

That in an effort to establish a factual basis for this allegation, appellant filed in the Criminal Court of Appeals:

(a) His "Application for Leave to Further Diminute the Record by Developing Facts of Importance to a Decision Here But Not Included in the Case-made" (Tr. 1142), wherein appellant charged that large deputy sheriffs, armed with pistols, were stationed in the courtroom during and throughout his trial, escorted the judge to and from different places, and created the impression that appellant was an abandoned and vicious character, dangerous to the safety of said judge, which said matter was given wide publicity by the press.

(b) His "Ancillary Application in the Nature of *Coram Vobis* to Diminute the Record" (Tr. 1162) wherein appellant charged that the Sheriff of Oklahoma County had been ordered and required to refute the allegations of his said pleading.

(c) His "Additional Application in *Form Coram Vobis* to Supplement the Record" (Tr. 1168) wherein he charged that on his former trial, which resulted in a mistrial, the press invaded the jury room, identified Paul C. Jones as the juror refusing to vote for a verdict of guilty, and publicized the vote of the jury under a large, front-page headline entitled, "Hurt Juror's Old Arrest Disclosed as Deadlock Moves Into Fourth Day"; that on the 24th of November, 1954, another article was published in the *Daily Oklahoman* under headline, "Judge Dismisses Hurt Jury, Declares Mistrial as Jury Stands 11 to 1 for Conviction"; and that on November 20, 1954, the *Daily Oklahoman* published a vicious article, destructive of the standing and reputation of this appellant under front-page headline, "Reporter Tells Story Behind Secret Record" wherein the interest of the press in procuring Massad to entrap appellant was revealed; that during the deliberation of said jury said juror's wife was threatened anonymously unless her husband yielded his conscientious opinion and voted for a verdict of guilty which said threat was communicated to the trial judge and by him ignored; that all said matters were given the widest publicity and circulation in Oklahoma County, Oklahoma, both by press and by television; that the same were read, seen and believed by the entire body of society, rendering it utterly impossible for appellant to secure a fair and impartial jury; that copies of said publication were attached to said pleading; and that, under such circumstances, his motion for change of venue was

denied and he placed on trial in said atmosphere so deliberately created.

That appellant offered to prove the allegations of each of said pleadings (which were verified) and his offer was, by the Criminal Court of Appeals, denied, which said denial of an opportunity to complete the record contributed to depriving him of his liberty without due process of law and is cognizable and curable by this Honorable Court: *Chessman* v. *Teets, Warden*, 77 Sup. Ct. 1127.

That this Honorable Court is charged with the duty of enforcing the Constitution of the United States, together with the Fourteenth Amendment thereto, and that the command of said amendment to "deprive no person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws" runs against the various states of the Union only, Oklahoma included.

That so, appellant charges that the State of Oklahoma and the public press have rendered him an outcast, his defense impolitic, unpopular and unprofitable, all of which accounts for his faulty and frail representation here.

That in said second opinion of the Criminal Court of Appeals by Judge Powell many other grievances and complaints of appellant were noticed and passed lightly by as a matter of form without regard to their substance, and he invites the attention of the Court thereto.

That appellant, impelled by necessity so to do, here presents in greater detail the substance of his complaints

to cure the frailty of his jurisdictional statement rendered too brief, in the interest of economy.

That appellant believes this to be a matter of great public importance, one to which each member of the Court should give attention to the end that further deprivation of constitutional right be avoided in the future.

That because of improper and insufficent presentation, this Honorable Court, as appellant believes, by error, oversight and inadvertence, overlooked and failed to consider the settled, controlling principles of law hereinbefore cited and the uncontradicted facts hereinbefore recited when it dismissed his appeal and denied him certiorari.

WHEREFORE, appellant prays that he be granted a rehearing herein, that upon said rehearing this Honorable Court assume jurisdiction of the subject matter hereof; and that upon final consideration said cause be reversed and appellant be granted a new trial to the end that he may have the benefit of a fair and impartial trial as guaranteed by the Constitution of the United States.

Respectfully submitted,

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Attorney for Appellant.

November, 1957.

CERTIFICATE

I, Sid White, attorney of record for appellant, do hereby certify:

That the foregoing Petition for Rehearing is filed and presented in good faith and not for delay. That said petition is restricted to substantial grounds available to petitioner and not previously presented.

Dated at Oklahoma City, Oklahoma, this ..... day of November, 1957.

SID WHITE,
445 Commerce Exchange Building,
Oklahoma City 2, Oklahoma,
Attorney for Appellant.